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ABSTRACT

This report of proceedings provides transcripts of 14 speeches concerning collective bargaining in higher education. Conference themes were: unionized employment relations; and the economic, political, and legal issues of the 1990s that are viewed as being influential in the collective bargaining process. The speeches are as follows: "Union Employment Relationships in the 1990's," (John R. Stepp); "Mutual Gains Bargaining for Higher Education," (Raymond A. Friedman); "Negotiation Models for the 1990's," (Louis Stollar); "Retirement Options of the Future," (Clifton Wharton); "Faculty Compensation in the 1990's," (Arnold Cantor); "Salary Equity Four Cell," (Lois Haignere); "Health Care Cost Containment in the 1990's," (William Hembree); "Life in the Academy after University of Pennsylvania v. EEOC," (Ann H. Franke); "Confidentiality and the Tenure Review Process after University of Pennsylvania v. EEOC," (Mark D. Hopson); "Anti-Discrimination Law and Academic Freedom after University of Pennsylvania v. EEOC," (Charles Shanor); "Keeping Academics Out of Court: Judicial Responses to Faculty Litigation and How To Avoid It," (Barbara A. Lee); "Campus Bargaining and the Law: The Annual Update," (Nicholas DiGiovanni, Jr.); "Union's Role in Politics in the 1990's: Lobbying and Coalition Building," (G. Terry Madonna); and "Political Action and Public Sector Higher Education Unions: California and Hawaii--Two Success Stories," (VirginiaAnn G. Shadwick). References follow papers. (GLR)

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COLLECTIVE BARGAINING IN HIGHER EDUCATION: THE 1990's

Proceedings
Eighteenth Annual Conference
April 1990

JOEL M. DOUGLAS, Editor

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Bargaining in Higher Education and the
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National Center for the Study of Collective
Bargaining in Higher Education and the
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INTRODUCTION

The start of a new decade offers the opportunity for reflection as well as a chance to look ahead to what the years might bring. Nineteen hundred and ninety marked the start of the 25th year, and the fourth decade, in which college faculty and administrators engaged in academic collective bargaining. In planning the Eighteenth Annual Conference, the Center's Faculty Advisory Committee concentrated on this opportunity to discuss issues that they believed will be dominant in the forthcoming decade.

DESIGN OF THE CONFERENCE

A critical question facing all who partake in labor relations is whether the adversarial model upon which the private and public sector legislative framework is predicated will continue. We invited John Stepp, Deputy Undersecretary for Labor-Management Relations of the United States Department of Labor, to present the opening address. Stepp discussed the creation of management and labor partnerships and how these can be used to create a collaborative rather than an adversarial model. Raymond Friedman of the Harvard Business School suggested a series of negotiation models for those who negotiate under a collaborative, in contrast to an adversarial, model. Lou Stollar, the president of the faculty union at the Fashion Institute of Technology, reacted to Friedman's models and assessed their potential for success.

The second theme presented at the Conference was based on legal issues for the 1990s. At the time of our planning sessions, the United States Supreme Court issued its ruling in University of Pennsylvania v. EEOC, a case involving the balance between academic freedom and confidentiality. We were fortunate in obtaining attorneys who participated in the case and who were willing to share their views with us. Charles Shanor, General Counsel of the United States Equal Employment Opportunity Commission, Lorrie Marcil of the law firm of Sidley and Austin, which serves as Special Counsel to the University of Pennsylvania, and Ann Franke, Associate Secretary and AAUP Counsel, discussed the relationship between these issues.

Barbara Lee, of the Industrial Relations School at Rutgers University and co-author of Academics in Court, presented her findings as to why many faculty personnel decisions are being litigated instead of being resolved at the local campus level. Lee concentrated on employment discrimination claims within the context of both unionized and nonunionized settings and what approaches may be taken to reduce time and costs.

As we have done in the past, the Conference included the annual legal review. Nicholas DiGiovanni, Jr., a management attorney with Morgan, Brown, and Joy of Boston, Massachusetts, prepared the review; however, he was unable to personally deliver it. Ann Franke and Jim Cowden, an attorney for APSCUF, substituted for DiGiovanni and supplemented his paper with their experiences. For purposes of this Proceedings, we have included the original DiGiovanni paper.

The third Conference theme was devoted to a look at compensation, health care cost containment, and retirement options for the 1990s. Clifford Wharton, the Chairman and Chief Executive Officer of TIAA-CREF, presented the keynote luncheon address. Dr. Wharton discussed retirement planning and what options TIAA-CREF was making available to faculty. Two aspects of faculty compensation formed the focus of the first small group session. Arnold Cantor, of the Professional Staff Congress, looked at "differential faculty salary schedules" and questioned their advisability and usefulness. Lois Haignere of the United University Professions, presented her research on "equal pay" and "comparable worth". The problem of health care cost containment was addressed by William Hembree of the Health Research Institute. His remarks focused on what the parties in a unionized environment can do to limit insurance increases.

We invited two experienced statewide union leaders to discuss the fourth Conference theme -- the union's role in the politics of the '90's. Terry Madonna, former APSCUF President and VirginiaAnn Shadwick of the California State University and President of the NEA's National Council for Higher Education, reflected upon union strategies and tactics that have been used in Pennsylvania and California.

As we have often done in the past, speakers from outside the world of academia have been invited to share their collective bargaining experiences with us. This year we invited Jack Donlan, a management negotiator from the National Football League Management Council, and Robert Berry, a professor of law from Boston College Law School to discuss labor relations in football. Papers were not submitted for this session.

THE PROGRAM

Set forth below is the program of the Eighteenth Annual Conference which lists the topics and speakers included in this volume of the Proceedings. Some editorial liberty was taken with respect to format and background material in order to ensure readability and consistency.

MONDAY MORNING, APRIL 23, 1990

WELCOME
John McGarraghy, Acting Provost
Baruch College, CUNY

COLLECTIVE BARGAINING UPDATE: 1990
Joel M. Douglas, Director, NCSCBHEP

PLENARY SESSION "A"
UNION EMPLOYMENT RELATIONSHIPS IN
THE 1990's

Speaker: John R. Stepp, Deputy Undersec'y
for Labor-Management Rels. and
Cooperative Programs
U.S. Department of Labor

Moderator: Frederick Lane, Professor
Public Administration
Baruch College, CUNY

PLENARY SESSION "B"
U. OF PENNA. V. E.E.O.C.
ACADEMIC FREEDOM AND THE SHIELD
OF CONFIDENTIALITY

Speakers: Charles Shanor, Esq.
General Counsel, EEOC

Mark Hopson, Esq.
Sidley & Austin, Wash., DC
Spec. Counsel to U. of Penn.

Ann Franke, Esq.
Associate Sec'y & Counsel
AAUP

Moderator: Ira Bloom, Vice Chancellor
Faculty & Staff Rels., CUNY

LUNCHEON
TOPIC: RETIREMENT OPTIONS OF THE FUTURE

Speaker: Clifton Wharton, Chairman &
Chief Exec. Officer, TIAA-CREF

Presiding: Joel Segall, President
Baruch College, CUNY

MONDAY AFTERNOON, APRIL 23, 1990

SMALL GROUP SESSIONS
GROUP I - FACULTY COMPENSATION IN THE 1990's

Speakers: Arnold Cantor
Executive Director
Professional Staff Congress, CUNY

Lois Haignere
Director of Research
United University Professions, SUNY

Moderator: Margaret Chandler, Professor
Graduate School of Business
Columbia University

GROUP II - NEGOTIATION MODELS FOR THE 1990's

Speaker: Raymond Friedman
Assistant Professor
Harvard Business School

Reactor: Louis Stollar, President
United College Empls. of FIT
Fashion Inst. of Technology

Moderator: Theodore H. Lang
Professor Emeritus
Baruch College
Arbitrator

TECH SESSION: HEALTH CARE COST CONTAINMENT
IN THE 1990's

Speaker: William Hembree, Director
Health Research Institute
Walnut Creek, CA

Moderator: Esther Liebert
Director of Personnel
Baruch College, CUNY

TUESDAY MORNING, APRIL 24, 1990

PLENARY SESSION "C"
CAMPUS BARGAINING AND THE LAW: THE ANNUAL UPDATE

Speaker: Nicholas DiGiovanni, Jr., Esq.
Morgan, Brown & Joy
Boston, MA

Moderator: Joel M. Douglas

PLENARY SESSION "D"
UNION'S ROLE IN POLITICS IN THE 1990's

Speakers: Terry Madonna
Millersville Univ.
Legislative Consultant
APSCUF

VirginiaAnn Shadwick
San Francisco State Univ.
Pres., National Council for
Higher Education, NEA

Moderator: Katherine Schrier
Educ. Fund Administrator
AFSCME, District Council 37
AFL-CIO

TUESDAY AFTERNOON, APRIL 24, 1990

PLENARY SESSION "E"
ACADEMICS IN COURT

Speaker: Barbara Lee, Esq.
Associate Professor
Industrial Rels., Rutgers Univ.

Reactor/
Discussant: Christine Maitland
Higher Education Specialist
NEA

LUNCHEON
TOPIC: LABOR RELATIONS IN FOOTBALL

Speaker:	Jack Donlan, Exec. Director National Football League Management Council
Reactor:	Robert Berry Professor of Law Boston College Law School
Presiding:	Matthew Kelly, Prof. Emeritus Cornell Univ., ILR, Arbitrator

SUMMATION AND ADJOURNMENT

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- An annual Spring Conference.
- Publication of the Proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.
- An annual Bibliography, Collective Bargaining in Higher Education and the Professions.
- The National Center Newsletter, issued four times a year providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.
- Monographs -- complete coverage of a major problem or area, sometimes of book length.
- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, important books and relevant research reports.

ACKNOWLEDGMENTS

The Annual Conference of the National Center has matured to a position where it is now acknowledged as the premiere event in academic collective bargaining. This could not have been achieved without the support and cooperation of our Faculty and National Advisory Committees. I extend thanks to them and to other friends of the Center who participated in the planning process for the Conference.

The preparation and editing of the Proceedings is the work of a team of six. Beth Hillman Johnson coordinated all aspects of this publication and assisted me with the editing. Ruby N. Hill inputted the entire volume ensuring its high quality production level. Two researchers, Lynn Havey and David Olexer, served as active proofreaders. Jeannine Granger transcribed speeches from audio tapes. The production of this volume is a credit to their dedication and perseverance. We are proud and pleased to make it available to our readers.

For any errors or omissions, we apologize. For all of the positive results and success of the Conference, I gratefully acknowledge all of the above.

Joel M. Douglas, Ph.D.
Director

I. UNIONIZED EMPLOYMENT RELATIONSHIPS: A NEW APPROACH

A. Union Employment Relationships in the 1990's
B. Mutual Gains Bargaining for Higher Education
C. Negotiation Models for the 1990's

UNIONIZED EMPLOYMENT RELATIONSHIPS: A NEW APPROACH

A. UNION EMPLOYMENT RELATIONSHIPS IN THE 1990's

John R. Stepp, Deputy Undersecretary
for Labor-Management Relations and
Cooperative Programs
U. S. Department of Labor

The topic I have been asked to speak on is "Union Employment Relations in the 1990's". I think, in order to even engage in any reasonable speculation about the 1990's, we have to look back at where we have been -- looking back almost a century, but focusing, in particular, on the last decade and with that in hand, I think we can begin to speculate a little bit about what union relationships may look like, both in the private and public sectors, as we move toward the last decade of this century. When you talk about union management relationships, I think you are talking fundamentally about how we look at work and working relationships.

I think one of the great difficulties that we have today is that the paradigm that we employ is one that is deeply rooted in the first industrial revolution, and we are having an extremely difficult time disentangling ourselves from that paradigm.

I do not know how many of you in your academic work have looked at the study of work but fundamental to the way in which we organize work, design work, develop work is the teachings of Frederick Taylor. Taylor was an industrial engineer who was very active in the world of work a century ago, a time at which we were first converting from cottage industries and an agriculture economy to one which produced goods _en masse_. The labor force had very little formal education, many spoke English as a second language, if at all, and almost none had any previous industrial work experience. With that kind of labor force, Taylor put forth a set of ideas and those ideas have become deeply embedded in our society. Taylor believed with such a work force you had to fractionalize work into the most minute and simple components that anyone, regardless of their education or intelligence or previous background can learn and learn quickly. Taylor also believed that there was a "one-best-way" dictum that if you went into the workplace with a stopwatch and a clipboard, you could study work and you could quickly determine the best way to do it. Taylor also believed that you had to have systems of control and compliance to make sure that workers worked within the framework of that one best way and within the narrow tolerances that were set forth for each of these fractionalized jobs.

But, perhaps most important, particularly in your profession, Taylor believed that you had to separate those who make decisions from those who implement decisions, and that became essentially the paradigm around which work was organized in our society. Now in saying that I know that there are some of you who are thinking "yes, but that was a century ago, you are talking about the 19th Century and our focus is on the 21st Century and we have long since left Taylorism behind", but that has not been my experience. I see it in manufacturing today but, I also see it in the service sector -- I see it in both public and private -- I certainly see it in the federal sector in the Department of Labor.

The way we organize work still is very much in accordance with the principles that Taylor put forth. Let me see if I can convince you of that by citing a few rather elementary examples. I make no claims to be a Freudian psychologist but I think our language often reveals a great deal about how we view things. We have all probably employed terms like farmhand and ranchhand and factoryhand; have you ever heard anyone say farmbrain, ranchbrain and factorybrain? When you think of this dichotomy that Taylor created between decision-makers and those who implement the decisions -- a thinker-doer dichotomy -- consider this for a minute. The terms blue-collar and white-collar suggest our workforce has no gray-collars or pink-collars, that people are in one camp or the other; professional and non-professional, hourly-salaried, labor-management, and I heard one more this morning, administrator-faculty. A kind of euphemism for those who make the decisions, the thinkers, and those who carry out decisions -- the doers.

If you look at our labor contracts, traditional North American labor agreements, if you want to find evidence of Taylorism, let me tell you where to begin your search. Check the table of contents, find the managment rights clause, look it up, and I think what you will read can be paraphrased somewhat like this: "Leave the thinking to us. Check your brains at the plant gate or the steps of the college or university or school or wherever you may be employed. That the important decisions that affect the welfare of this institution be made by a select few. Not the many, and not the representatives of the many." It may be the single most restrictive work practice that we have in American working society today. It says; "we do not want people to be giving freely of their creative energies, their ingenuity, their initiative -- we will tap only a very few in order to get those ideas."

Let me advance the clock a little bit now to the New Deal period when the cornerstone of our industrial relationship was set forth by way of public policy, namely, the Wagner Act of 1935. Now, I know many of you do not operate in the private sector but I do not know of a state that has not patterned its collective bargaining statute after the National Labor Relations Act. They have replicated it but the basic model, I think, has been adopted by every state which is probably in and of itself a great mistake. The Wagner Act says Taylorism is legitimate. Our workforce is comprised of two groups of employees and their representatives, and managers or employers, and their interests are largely separate and apart. The nature of the relationship should be one of arms length and largely adversarial. The Wagner Act sanctified Taylorism in terms of public policy. It said "look, we can ill afford, in a civilized society, this ruckus between these two groups to take place in the street. What we must do is to bring it into a ring where it can be refereed." We brought the two fighters into the ring as a matter of public policy and said we would provide the referee. We call the referee the National Labor Relations Board and we set forth a set of do-nots, unfair labor practices we call them. We say you cannot hit a man below the belt or when he's down. You cannot do this. You cannot do that. But, in saying that, we are also saying implicitly that 1) the fight is the natural order of things, 2) our workforce is comprised of two groups, 3) the relationship is adversarial and, 4) all we need to do is make sure the fight occurs within a fairly civilized framework.

Moving the clock forward a decade or two, the period from 1945 to 1975, we see our industrial relations practices and policies that matured during the post-World War II era, a period when we sat atop the global economy in many ways almost able to dominate virtually every market that we chose to enter. During that period, a kind of tacit deal was struck between labor and management, at least in the private sector. In the great American industrial heartland, stretching from roughly Boston in the northeast to Minneapolis-St. Paul in the west that deal went something like this. There was only token resistance by employers to unions' efforts to organize. There was never a warm embrace mind you, but we did not see vicious opposition to efforts by employees to organize in the basic manufacturing industries of America. The second part of the deal was at our bargaining tables, although we went through a kind of bizarre ritual or mating dance conducted largely for the benefit of the rank and file. When it was all said and done you could almost always count on the fact that labor costs and benefit costs would go up more than real productivity gain. Now, what did management get in return for token resistance to union efforts to organize and token resistance by management at the bargaining table? I think what it got in return was the right to continue Taylorism, the right to continue basically an adult-child relationship at our workplaces. It was almost as if, by design, we created a system for organizing work that assured us of passive non-engaged, non-responsive employees who would come to accept the dictates from above, salute smartly and do precisely what they were asked to do -- no questions asked. And in return, we threw money at them.

Some good things happened as a result of that, not the least of which was the creation of the great American middle class. But unfortunately, the kind of cozy environment which made all of that permissable, eroded rather rapidly in the 1970's. We saw turbulence in many forms. We saw it in the global marketplace -- we saw it in terms of new technology that was so rapidly telescoping both product and process life cycles -- we saw it in the deregulation of many of our key industries -- we saw it in terms of the changing demographic mix of our labor force -- and we saw it in terms of new attitudes by a new administration with respect to labor relations and collective bargaining. Certainly, in your industry you saw it in the form of the Yeshiva decision. All of these were forces of change coming from a variety of directions but converging almost at the same point in our history. I think their collective impact was to render obselete that post-World War II industrial relations model.

I would say, for the most part, the 1980's was a decade of experimentation and struggle. During the early part of the decade, there wasn't much experimenting going on because the basic attitude among employers, particularly in the private sector, was that this too shall pass. We have been through business cycles before. Things are not so good now but, if we hold tight, we will see that cycle reverse itself and we will get back to business as usual. Those who adopted that posture, and they were in the majority, when feeling these economic forces that were blowing across the country decided that what they had to do was to kind of tighten up, tighten screws a bit until we got back to more normal conditions. Well, screw-tightening in many organizations often means let's cut or reduce some of our variable costs, and often labor is the most variable of all costs. We saw a wave of concessionary bargaining. We saw efforts to replace many people who had a labor contract with a commercial contract. We saw work subcontracted out that had normally been done in-house. We saw automation going on; these were manifestations of that strategy. We were intent on redoubling our efforts, the very efforts that had gotten us in the very disastrous position that we were presently in. By the middle of the 1980's, the general frame of reference was beginning to shift to one of growing concern about maybe, just maybe, we would not go back to business as usual, maybe this was something more systemic, maybe we were not talking about the ebb and flow of an ordinary business cycle. At that point, I think we really did begin to see some experimentation in our field, rather limited experimentation because often what was done was limited to a particular group or to some rather finite area of the relationship. We saw surging quality circles, employee involvement and participation became household words. We saw, in many industries, efforts to at least alter somewhat the compensation system by doing things with respect to gain sharing. Fundamentally though, we did not change the essence of the way we organize work and working relationships. If you look at those organizations that engaged in those experiments, I think you would find that the business strategies were largely the same. Certainly, their human resource policies were not materially affected and the way in which they conducted labor management relationships was essentially as it always had been. Power, knowledge, information and rewards that flowed down that hierarchy continued to flow down. We created parallel systems where we did very limited experimenting, always being careful though not to upset the traditional organization with its power, perks and prerogatives. In short, I think those experiments were about a mile wide and about an inch deep. It was almost as if we believed that the basic institutional arrangements that we had for managing work were nearly perfect and all we had to do was to find some way to fine tune the system a little bit. If we could turn the right lever, or make the right refinement then all would be okay. I think when you look deep into the heart and soul of most of our organizations today, it is a fair statement to say that not much has changed.

Now, that brings me to the 1990's; here it is more risky. I think we are beginning to see, both in the private and public sector organizations, stepping back and fundamentally reexamining their business and/or organization strategy. They are beginning to realize that we cannot go on doing what we have always done. In the private sector, that often meant turning out high volume standardized products because that work is gravitating to low cost third-world countries. As we reexamine our organization strategies, we hear with increasing frequency terms like quality, quality of goods, quality of services. We hear words like excellence, cutting edge, riding the crest of change, and flexible organizations. I think those who are moving in that direction are moving appropriately but, if you look back at the previous couple of decades, we had a lot of programs, be it "zero defects", "management by objectives", and these were the great panaceas of their day. Somehow, they never really lived up to their advanced billings.

I think a good test about whether or not we are serious about excellence and quality goods and services, almost a litmus test, is to look one step below the organization strategy at the human resource strategy because how in the world can you produce quality goods and services if you continue to have that inactive, non-engaged, non-responsive workforce that we created as a result of Taylorism. I think it is true to say that the institutional values that underlie our organizations must be at least as lofty as the goals to which the organizations themselves aspire. If we are not making those kinds of changes, then we are not serious about these new organization strategies. I would like to just tick off what I think are some of the critital ingredients to these new workplaces. One is a sincere effort to empower people at the lowest possible level, not through giving them some opportunity one hour a week to engage in group problem-solving, or quality circles, or those kinds of things, but to push decisions down to the lowest possible level where workers, be they in institutions of higher education or in an automobile plant, are making decisions that heretofore had been made by two or three levels of management above them. Where we are beginning to blur that Tayloristic distinction between employees and employers, or workers and managers, is where every employee is at least becoming a manager of information and, of course, this takes us immediately against the grain of _Yeshiva_. Those of you who are familiar with _Yeshiva_ know that as workers gain autonomy and decision-making power, they increasingly run the risk of not being protected by the National Labor Relations Act. Public policy embedded in the 1930's, from which we had a well insulated domestic economy, I think is doing us a great disservice in terms of the needs for an industrial relations system supported by public policy today.

The second ingredient that is terribly important in these new workplaces is the concept of reciprocity. I have yet to meet an employer or a manager who was not interested in having a committed workforce. Yet, if we know anything at all about commitment, it is that we know that commitment is a two-way street. If I want you to be committed to my goals, I need to first demonstrate to you that I am committed to yours. That means employment security -- it means flexible employment practices that enable people to balance their personal lives and their working lives -- it means that if we expect workers to give their knowledge and information about how their job can be done better, that we should do likewise and provide them with knowledge and information that we have about the future plans of the organization and the direction it is moving and how all of that may impact on them. These new organizations are expending far more in terms of training and retraining; you cannot believe that human resources or people are your most precious asset and, at the same time, allow those assets to depreciate, to rust, to become obsolete, and with the pace of new technology, the likelihood of that is extremely high.

Today, the Bureau of Labor Statistics tells us that for a worker entering their working life today, they can expect to change jobs no fewer than eight to twelve times and the difference is the rate at which you project the introduction of new technology. It means we have to retrofit people eight to twelve times during their working life. It was only a few generations ago when we passed skills down from grandfather to father, to son, and now we are talking about within the life of a single generation having to change what they know and what they are able to do some eight to twelve times.

I think in these new workplaces we are taking a fresh look, a long overdue look, at compensation and trying to better align some portion of one's remuneration with the performance of the organization -- employee's stock ownership, profit sharing, gain sharing, and a variety of ways to better link the goals of the individual with that of the organization. Still another way is providing a meaningful voice for employees in these longer term decisions which inevitably impact on their income and/or employment security. Here, I think organized employers have a tremendous advantage but they seldom capture or capitalize on that advantage. They have a structure. They have people who are represented and have a means of soliciting a meaningful voice. But too often, they engage in tactics designed to suppress rather than to encourage input into decisions at a higher level. All of these I think are sort of incapsulated in a set of shared values. We are learning, particularly in those sectors that are so impacted by rapid change; market changes, and technology changes, that we can no longer go on managing organizations by a set of normative rules by a lengthy labor agreement, by personnel policies and practices. I think it is true that one can reasonably manage an organization during times of stability by such impersonal means but in most of our sectors today, we have anything but stable conditions and, in the absence of stability, relationships are critically important in whether there is a set of shared values.

In terms of labor relations in the 1990's, let me risk a rather controversial prediction. I believe as we move through this decade and enter its latter half, we are going to see very few examples of a traditional adversarial labor management relationship. The reason is a kind of social Darwinism. I do not believe that organizations that are encountering these winds of change would be able to survive much less flourish, if the employer and employee are still engaged in an adversarial relationship that is set forth in accordance with some set of normative rules spelt out in a lengthy labor agreement. The organization would simply be too inflexible, too unable to take advantage of changing conditions.

What then is going to happen? Well, I think we already see much evidence of what is happening. Employers increasingly are coming to a kind of crossroads and see themselves as having two alternatives. They know their destination. The destination is to create a working environment where people are turned on rather than turned off, where people are active and engaged and responsive. Only that kind of human resource environment will enable them to reach their business objectives. They know the traditional adversarial will not get them there. They see two roads leading to that destination -- one is labeled non-union and we see many take it, in fact, maybe more taking it than taking the other road. Those who take it often employ one of two strategies; they can be the Eastern Airlines or the Greyhounds, or they can employ a much more subtle way. A company like Westinghouse entered the 1980's with almost 80% of its hourly workforce represented. Today, I am told that figure is about 17%. From 80% to 17% in one decade. Probably fewer hourly people per capita represented at Westinghouse than at Eastern Airlines. You hear talk and read about Eastern. You don't about Westinghouse. What the Westinghouses do is divest themselves of old organized industries and enterprises and carefully target their new capital investment dollars to "Greenfield sites". Using very sophisticated recruitment and employment techniques, they select a workforce that they have every reason to believe will not be interested in being represented and then they put into these workplaces enlightened management practices designed to eliminate any possible need for people wishing to seek representation. And it works.

The other alternative though, and the one that interests me, is the creation of union-management partnerships. We are seeing more and more companies taking that road yet, the total still is very much in the minority. Labor and management are beginning to recognize that they share much more in common than they have by way of differences. They are beginning to recognize what their shared values are and they are designing ways and means of reaching those shared goals. We have seen it in the public as well as the private sector. We have seen it across a variety of industries. Yet, having said that, the movement along that road is still a very slow one and even those who select it do not often make it to their destination.

There are some serious obstacles in our path as we try to create these labor-management partnerships and I would like to mention three or four of them. One I think is a kind of inertia. As a people and as a society, we seem to be unable to deal with change except when we have faced death directly in the face and we have a cataclysmic event on hand. Then, and only then, are we prepared to change our behaviors and the way we engage one another. The future is a product of the events of the present and if we want a different future, we must invent it. I think a second obstacle that stands in our path are the roles that we have learned. In labor relations, we have some very dysfunctional roles. Unfortunately, those of us who grew up in that post-World War II system learned those roles and learned them very well and were rewarded because we did and thus, had those roles reinforced. The typical first-line supervisor during that era was the stereotypical John Wayne. We wanted first-line supervisors to act and behave the same way John Wayne acted and behaved, and now in these new workplace models, we are saying to John we want you to be a facilitator, a coach, a resource person. It is a difficult shift. On the one side, John's counterparts were the union shop steward, the committeemen, and the ambulance chasing lawyer. The ambulance chasing lawyer and John Wayne are hardly what we need in today's workplace.

The model that we have of thinking, particularly in the private sector, is of corporate legal entities -- institutions managed solely on behalf of the stockholder. The objective of which is to maximize the return on the stockholder's equity. Clearly, that did not do much to create a sense of community, a sense of togetherness, a sense of team. More and more, I think we are realizing that successful organizations are not legal entities. They are communities. They are a community of people who share common interests and common goals and common values. Yet, the legal model, the Wall Street model, is very different from that. As we try to shift the paradigm from Taylorism to a workplace model in keeping with the needs of today, we desperately need leaders and too often, what we have are managers or administrators. Managers inform -- leaders communicate -- managers motivate -- leaders inspire -- managers are concerned with solving problems in the present -- leaders are visionaries -- managers are concerned with procedures -- leaders are concerned with principles. We are over-managed and under-led.

The third big problem that stands in our path, particularly in the field of labor relations and collective bargaining, are the tools that we have. Those of you who have been involved in contract negotiations know exactly of what I speak. Mark Twain, perhaps, put it best when he said if the only tool you have is a hammer, every problem tends to look like a nail. If you have looked in a traditional collective bargaining tool kit, let me tell you what you are likely to see. You are likely to see sledge hammers, tack hammers, hammers of all sizes and shapes that you can pick between to beat the other side about the head and shoulders. But, there are no other tools.

Consider the concept of negotiating for a second with this very simple anomaly. Supposed you had a used car, a real used car, lots of miles on it, and you were about to engage in a negotiation, a transaction, and the party that you were selling this used car to was your very best and dearest friend. How would you behave? What would you do? What would your objective be? Would it be to get the best deal at any cost? Would you share information, would you tell him or her that the brake pads had not been changed in 50,000 miles -- the old clunker is a little hard to start on a cold day? I suspect you would. Consider now the same scenario, but the buyer is a total stranger. Would you behave any differently? We may have some saints in the audience who would say I would behave the same way. Maybe, we have some devils who treat their friends like a perfect stranger. Well, I probably would behave differently. Now ask yourself in terms of employees negotiating a labor contract with employers. Which scenario is the more appropriate one? Don't we have a lasting relationship? Aren't we mutually dependent? Won't there be opportunities for the other side to get back at us if we are untruthful or unfair? Yet, when you look at how we negotiate, it is as if we were selling a used car to a perfect stranger. Think about the process for a second. We start, both sides meeting separately, determining their own special interests as if they shared none in common. As they prepare for negotiations more often than not, they are looking backwards asking what went wrong in the last agreement? What are yesterday's problems we need to solve? To paraphrase Marshall McLewin, it is almost as if we are trying to drive into the future while looking out the rear-view mirror. When we get to the bargaining table and after we are through exchanging pleasantries, then we get down to real bargaining, swapping one-sided proposals, denying the legitimate claims of the other side because empathy is a sign of weakness. We withhold information because information is seen to provide a tactical advantage. We often denigrate and ridicule, not only the positions of the other side, but the people who hold those positions. We dissemble, we distort, we never lie. We think about how we allocate our time more often than not; the items that are most critical to both sides are held in abeyance and with about five percent of the time left, we turn to the issues which will jointly shape our future. We allocate 95% of our time to the miscellaneous, five percent of which is truly important. That process lacks face validity. Bad bargaining habits yield bad contracts and bad relationships. Until we are willing to substitute interest-based bargaining with mature problem solving, we are not going to get where we need to be. At best, the old system produces settlements. Today we need solutions to real and lasting problems.

Let me conclude with a word on public policy since Yeshiva, this dark cloud that sort of hangs over higher education. Clearly, I think the public policies that we have rooted in the 1930's are dated. We need some fundamental change in the way we encourage people to recognize their common interest and to go forward. One of the first things we must do, I believe, is to address the problem that we have of union suppression. In part, we alone, among the industrialized democracies of the world, allow employers to engage in vicious anti-union election campaigns.

Secondly, I think if we could somehow eliminate the union suppression model and say fundamentally that people, workers of all types are entitled to both an economic and political voice then perhaps, we could lift some of the restrictions on exclusive representation and allow more experimentation in terms of models of representation. We could even allow the union model to compete against the union substitution model, the model that I described when I talked about the Westinghouses of the world. When we look at other societies we find that, particularly in the Nordic countries and central Europe, people with grey collars, pink collars and even white collars are represented. There are probably very few among us who do not have some commonality of interest. It is not unusual. It is not unnatural for people who hold some common interest to want to advance those interests together. Yet, when we continue to divide our workforce into two groups -- as Taylor suggested, draw a line right down the middle -- say which side are you on -- you can only be loyal to one, not both. You are either for us or you are against us -- that the union can only exist after it has engaged the employer in a holy war and won, sets in motion a whole set of dysfunctional and destructive kinds of behaviors that do not serve us well in this day and time. If we were continuing to look at public policy, certainly the distinction between mandatory and permissive bargaining is one that I think now is also outdated. There are any number of things that we could do to tinker with the system but fundamentally, I think, I have already described the major changes that might be in order. Unfortunately, it is not even in the public debate today. When you look at workplace issues that are being discussed, and have been discussed in the last few years, there have been such monumental matters as plant closing notifications. If you paid any attention to that last year, there was a holy war conducted as to whether employers should be required, by law, to tell people 60 days in advance that they were going out of business. You would have thought the Republic itself was going to rise or fall depending on the outcome. The law passed and went into effect February of 1989 and we have not heard a peep since. Today, we are prepared to go to war on parental leave yet, we are not prepared to ask ourselves, in a democratic society, what kind of system of representation do we want to give people in the workplace. I think that that debate is long overdue and until we are willing to roll our sleeves up and engage in it, then I think we are going to suffer some very dysfunctional consequences.

UNIONIZED EMPLOYMENT RELATIONSHIPS: A NEW APPROACH

B. MUTUAL GAINS BARGAINING FOR HIGHER EDUCATION

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Mutual gains bargaining (MGB), also called "win-win" bargaining, is a new approach to labor negotiations that has been receiving much attention lately. The Department of Labor has subsidized experiments in mutual gains bargaining using a team from Harvard's Program on Negotiations. Jerry Barrett from the Department of Labor's Bureau of Labor-Management Relations and Cooperative Programs has designed a training program in MGB that is being implemented by FMCS mediators across the country. The Illinois Education Association has used MGB in about 50 cases over the last five years, and there are many private providers of training in MGB, some of whom have worked with labor negotiations. Although the spread of this approach is impressive, we are at a point where we should collectively stop and assess the MGB approach to negotiations. It certainly does cause change, but is the change that it causes what is needed?

MGB: HISTORY AND IDEAS

The idea of "integrative" conflict resolution dates back to Mary Parker Follett in the 1930s who argued that differences encountered in business administration should be resolved neither through domination nor compromise. Conflicts and differences should be openly addressed so that solutions can be invented which satisfy the real underlying desires of the parties involved. To find those real underlying desires involves "breaking up wholes" into constituent parts. To explain this idea, Follett analyzed the dilemma faced by a friend who wanted to "go to Europe" but could not afford the trip. What were the constitutent parts that made going to Europe desirable? Going to Europe could mean many different things, including "a sea voyage, seeing beautiful places, [or] meeting new people (p. 41)." To her friend, she found out, going to Europe meant meeting people. Once that was realized, her friend was happy to teach at a summer school where she would meet an interesting group of students. As Follett explains, "this was not a substitution for her wish, it was her real wish (p. 42)." Follett's approach involves, not being "nice," but being clearer about what is desired:

> A friend of mine said to me, "open-mindedness is the whole thing, isn't it?" No, it isn't; it needs just as great a respect for your own view as for that of others, and a firm upholding of it until you are convinced. Mushy people are not more good at this than stubborn people (p. 48).

Her ideas were picked up thirty years later when Walton and McKersie wrote A Behavioral Theory of Labor Negotiations. They argued that within any labor negotiations four processes occur simultaneously: traditional distributive bargaining, integrative bargaining of the sort described by Follett, intra-organizational bargaining and relationship building. Fifteen years later, Fischer and Ury brought back a normative approach to integrative bargaining, describing how to do "win-win" bargaining. Their approach is expressed in four succinct points:

1) Separate the people from the problem.

2) Focus on interests, not positions.

3) Invent options for mutual gain.

4) Insist on using objective criteria.

The most important of these points is the distinction between positions and interests. An interest is an underlying desire; a position is one way to satisfy that desire. It is important to express ideas in terms of interests so that bargainers are free to find alternative ways to solve the problem. While one way of meeting an interest may be unacceptable to the other party, others may be acceptable.

These ideas are typically conveyed to bargainers through joint training. Ideally, the first round of training includes many people from the union and management--perhaps, 20-30 from each side. The purpose of this round of training is to familiarize constituents with the ideas of MGB and build broad support for the process. This step may be needed in order to gain approval for using MGB.

Later, once the actual bargaining teams are chosen, the members of both teams meet together for several days of training. These days are structured to prepare participants to engage in an extensive simulation of bargaining. During this simulation, they can practice the ideas of MGB, see where those ideas conflict with what they naturally know how to do, and sense where pressures might come from to make them deviate from MGB. It is striking how "real" simulations can become, and how good a predictor they are of behavior in negotiations. After the bargainers get a better feel for MGB through the simulation, they discuss how they will actually use the ideas in practice and create a set of rules to govern themselves during negotiations. (Exhibit 1 shows an example of a set of rules created by the bargaining teams). Finally, at some

Exhibit 1

DRAFT - GROUND RULES - DRAFT

(written by "Midwest University" negotiators after MGB training)

1. Reporting and accountability to the second table

   - define second table so that authority and relationships are understood

   - share explicit strategies for dealing with these constituencies

   - insist that second tables develop options and not positions

   - issue reports (perhaps joint) to our second tables; tone of presentation must be consistent on both sides

   - Union Newsletter will include, throughout the process, a "from the table" column to keep the bargaining unit informed of the issues; will discuss options and interests being explored at the table

   - Faculty Senate reports will be based upon the second table reports

2. Press Relations

   - seek to manage for benefit of communication to the community (University and beyond) but will not black-out

   - issue joint press releases, as necessary, tied to the second table reports; _______ will draft these press releases and submit for joint team review

   - both sides will have one official spokesperson for the press; other press contacts will be forbidden

Administration - __________
Union - __________

Exhibit 1 (cont'd.)

3. Negotiating Ground Rules

- establishing internal procedures for team meetings and agenda setting

- set agenda for each subsequent meeting before adjournment

- establish time limits for caucuses

- establish a commonly agreed upon set of demographics about the bargaining unit (i.e. size, average age, salary ranges, etc.) This will be done jointly with help of ___________

- establish a precise mechanism for joint investigation of data, including access to and use of expert presentations

- explicitly separate invention from commitment and creation from analysis

- explicitly avoid closure on single issues

    - -- trade options
    - -- link issues
    - -- develop packages

- attorneys for the union and administration may be consulted as appropriate, but will be permitted to attend sessions, only by mutual consent and only as silent observers, unless joint agreement otherwise.

- facilitators, including FMCS will be consulted as needed, by mutual agreement

- subcommittees of team members may be used to generate ideas and develop options about specific topics; okay to add other people outside the Teams to these subcommittees

- these ground rules may always be modified by joint agreement point during training, there is a discussion about the status of the relationship between the two sides.

Within this basic framework, there is a great deal of variation: some trainers emphasize relationship analysis more than others; some have simulations which are intentionally close or distant from the actual conditions of the parties being trained; and some are more directive than others about specific procedures. The approach is still developing.

RESEARCH FINDINGS

Over the last three years, I have studied eleven cases of negotiations, three of which included attempts to promote MGB. One of these three cases involved a faculty union negotiating with a university (that I will call "Midwest University"). In this case, I was able to observe the training and the negotiations, interview participants, and do several rounds of surveys. Most of the discussion below will be about Midwest University's experience with MGB. The ideas of MGB, I discovered watching Midwest University, are very powerful but they also leave many problems unresolved. There are six challenges that the negotiators at Midwest University faced that are typical of mutual gains bargaining and worth discussing in some detail.

PROBLEMS FACED DURING MGB NEGOTIATIONS

1) "You are doing 'it' wrong."

Even though both sides went through the same training, they often came to the table with different impressions of how MGB was supposed to work. They both knew that they were supposed to talk about "interests" and not "positions," but what one side considered an interest, the other considered a position. Each side was sure that the other was doing "it" wrong.

The union complained that the university was being too general: the university's interest was that they wanted "excellence". This was not helpful because it did not tell the union what the university really wanted. One union negotiator said that, to him, excellence implied buying computers for poets, while for the administration, it meant merit pay. From the other side, the administration was frustrated that the union was being too specific: they wanted, among other things, to "insure that the duration of academic leave under Article 42 [six months at full pay or three quarters at 2/3 pay] is at the unit member's option." This was not an "interest" but rather a "position", the administration felt. A union bargainer later defended their interest statements, saying "we are presenting our interests."

The basic ideas of MGB are ambiguous enough to allow for different interpretations. Negotiators can legitimately believe they are using MGB yet, come up with very different approaches. Indeed, it is probably true that the underlying "interests" for management can more easily be encapsulated in statements like "we want excellence" than they can for the union. Beyond such "honest" mistakes, people do fall back into old habits occasionally, and there are external pressures from constituents to present their positional demands at the table. When the ideal process is not followed by one side (for any of these reasons), the other side will attribute to them a lack of skill, a lack of intelligence, or a lack of commitment to change. Moreover, the more one side feels it is trying hard to do MGB right, the more frustration is produced by the perception that the others side is not doing it right.

This pattern played itself out at the stage of discussing interests at Midwest University, and again at the level of inventing without committing. Even though each side was supposed to be able to brainstorm openly, people were criticized for coming up with ideas that were "not well thought out".

2) "What do we do now?"

A second area of ambiguity was the actual structure of how to proceed. MGB theory tells us what we are supposed to accomplish, but how do we do it? Should we make formal presentations, or just talk? Should we use outside experts on finances and health care, or will bringing in outsiders who were not trained in MGB destroy the process? Should we stay together as one large group so that more ideas are available for each problem and so that everyone understands all issues, or break up into subcommittees? And, given the fact that we had established stages for ourselves (see Exhibit 2), the recurring question was: "are we 'negotiating' yet?"

Throughout the negotiations, each new stage presented negotiators with procedural ambiguities. At one critical point, when time was running out, the administration was wary of negotiating in subcommittees: "Break up into subcommittees? We are not ready to break up. We do not even know what to get angry about." Yet, there was more work to do than time to do it with only one negotiating table. Finally, the switch to subcommittees happened only after the trainer visited the group and told them that they had to use subcommittees to meet the deadline.

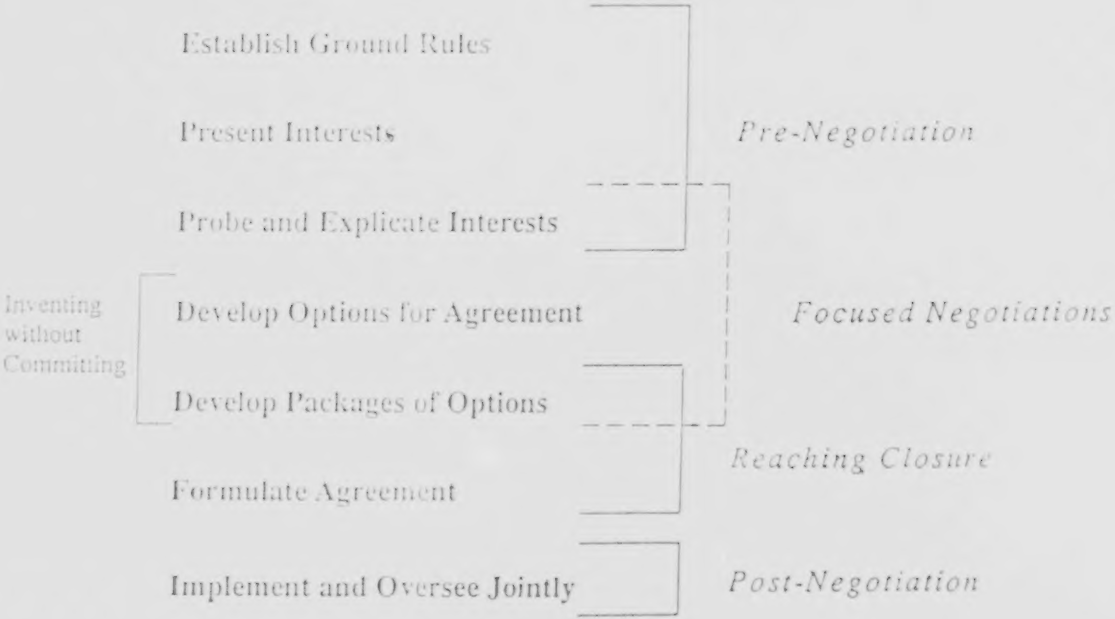
3) "We are running out of time!"

Exploring interests, brainstorming for alternative solutions, and collecting the information needed to objectively assess those options takes much longer than laying out a set of positions, waiting until most drop off the table, and then compromising. More issues will be discussed in more depth by more people than in normal bargaining. MGB will stretch the capacity of individuals to absorb new ideas and be patient for issues to be resolved, and it will stretch the capacity of both organizations to staff negotiations and research the options being generated.

At Midwest University, time pressures loomed large. Any one issue could be discussed indefinitely, and more issues were being generated than ever before. Each new, interesting idea created the need to collect information that was not easily available. The negotiators would often be at the mercy

MUTUAL GAINS BARGAINING

Phases



Establish Ground Rules

Present Interests

Probe and Explicate Interests

Develop Options for Agreement

Develop Packages of Options

Formulate Agreement

Implement and Oversee Jointly

Inventing without Committing

Pre-Negotiation

Focused Negotiations

Reaching Closure

Post-Negotiation

Exhibit 2

of outside providers of information who thought that a week or two turn-around time was fast. There were many days when the problem was, "when will the insurance company come back with the calculations" or "did the report on 'Western University's' compensation system arrive yet?" People who need quick resolution of issues will be very frustrated with MGB.

4) "There is no 'objective' data."

One goal of MGB is to establish objective criteria for making judgments about options. That depends on having objective data. Great efforts were made at Midwest University to jointly and fairly analyze the finances of the university, but to no avail. The assessment of what level of financial resources was available for faculty salaries (i.e., the "financial condition" of the university for purposes of bargaining), could not be determined objectively. It depended completely on definitions of a "university" and philosophies of administration that the two sides could not agree on. Moreover, since management created the numbers, the union could not completely trust them.

Beyond budget data, each new idea created tremendous research requirements. After a series of difficult meetings where the union did not have the appropriate data to assess a particular option, one administrator responded with frustration in caucus: "They did not do their homework. I will not go out and do research for them."

5) "What do we do with our constituents?"

Negotiators on both sides negotiate not only with each other but also with their constituents. There is, in effect, a "second" bargaining table for each side. This problem created the biggest challenge to MGB at Midwest University. Early in negotiations, the administration said that they did not have any positions underlying their interest statement. A union negotiator responded, "we do not either, but our second table does!" And, when the idea was suggested to put out a joint interest statement, this same person explained: "it makes us look like we are selling out. [Our members] do not want us to sell out until the last day!"

Even where constituents supported MGB, often they did not understand it. They were involved in the early stages of training, but not the intimate learning about MGB that comes from using it in practice. In one case, the union bargaining team was asked by a member of the union's bargaining council "did they 'buy' our interests?" He did not understand that interests were not proposals that could be rejected--they were simply statements of fundamental desires.

Constituents were also distrustful of the new ideas that the MGB process is designed to produce. When a new idea for a salary structure was described to the union's bargaining council, one angry member challenged the negotiators for even discussing an idea that was not included in the union's survey of its members. Anything that was not sanctioned by them should not, they argued, be discussed with the administration.

Members wanted more information about and control over negotiations, while the team felt that, at times, it was impossible to brainstorm with constituents looking over their shoulders.

So far, I have discussed only the union's constituents. The same problems developed for the administration's team, but at a later point in time. When they were eventually subjected to the questioning and wrath of the Dean's Council, the union was pleased that their counterparts had finally gotten a taste of what they were subjected to over the previous weeks. When only the union was under such pressure, it was hard for the administraton team to understand and appreciate the dilemma faced by the union and the way that that affected their behavior in negotiations.

6) "MGB collapses in the final stages of negotiations."

In spite of all the efforts made throughout bargaining, in the end negotiations became very traditional. When it finally came down to dealing with salary increases and putting the whole package together, both sides caucused frequently, only the lead bargainers spoke, positions were presented, and grudging compromises were made. The innovations that had been developed were turned into chips to be traded and packaged with particular salary offers, and the MGB process itself became a chip--"if you do not give us enough of an increase, we will abandon the MGB process," was a sentiment expressed by some members of the union's second table. Final bargaining occurred mostly in small, spur-of-the-moment meetings between lead bargainers, the president of the university, and the president of the union (who was not one of the bargainers). Near the end, a union bargainer said "MGB is out the door. It is good for rational bargaining, but it is gone now."

In spite of these problems, MGB created some significant changes at Midwest University.

BENEFITS OF MGB NEGOTIATIONS

1) Change of Interactions

From the first day of negotiations, bargainers did not act like they would in normal negotiations. They did not line up on opposite sides of a table, and they caucused only before each meeting. When one experienced negotiator in the union suggested that they caucus if anyone was not sure what to say, the lead bargainer explained that that was not necessary in MGB. There was nothing wrong with showing doubts or internal disagreements to the other side. During the joint meetings, negotiators were able to say openly, "I do not know," "I was wrong," or,"Can I ask a dumb question?" On the other side, the administration's lead bargainer instinctively stamped "confidential" across the top of the administration's list of interests before their first bargaining session, then, realizing that this was not necessary, tore the top off of the sheet and distributed the list to the union. Each side tried hard to listen carefully to the other side, probing for clarification and restating what they thought the other side said in order to make sure they understood it correctly. Many people were involved in the discussions--the lead bargainers did not maintain tight control.

Everyone tried hard to stick to the MGB process. When an administration negotiator mistakenly said, "I understand your position." A union negotiator shouted back, "interest!" The administraton negotiator apologized immediately and jokingly slapped his own hand. One union negotiator, during the interests stage of bargaining, finding himself making specific suggestions for change, stopped himself in mid-sentence, and said "No, that is getting into options. Forget that!" And later, when a union bargainer finished explaining a series of changes that his constituents had suggested, another member of the union team asked him: "If we address all these little things, would you really be addressing the underlying problem?"

Where there were confusions about the process, the negotiators at Midwest University developed new labels that fit their current needs for expression. When they were not sure if an issue was an interest or a position, they decided to simply label it a "problem" for the purpose of discussion. When there seemed to be nested levels of interests, they called the overarching goal an "umbrella" interest. And, at one point when the union was describing a concern that could not be expressed as a clearly defined interest, a union negotiator decided to dump the use of labels altogether. She said, "We are not exactly sure what we want. Let us just explore."

The atmosphere was much more comfortable, I was told, than the old style of bargaining. There was less personal discomfort. Issues that led to heightened tensions were usually resolved within a day and they left behind no personal antagonism. The only complaint was that "it is hard to be nice all the time." Being angry and oppostional is sometimes simpler and easier.

2) Better Understanding

As a result of the open discussions that occurred, both sides learned much about the university. Many problems, it turned out, have worsened due to a simple lack of communication: by hearing the different sides talk about what they knew, everyone was able to see the whole picture more clearly than they had before. People were brought together who normally would not meet, allowing learning to occur that was not possible in any other forum. Each of the bargainers knew the university very well by the end of negotiations.

3) Better Relationship

The bargainers not only knew the university better by the end of negotiations, they also knew each other quite well. Some genuinely close relationships had developed across the table and between different subgroups on the same side of the table. Negotiations did not produce the level of bitterness and hostility that accompanied past negotiations at Midwest University, so that there was far less mopping up to do after negotiations. And, in addition to simply not hurting the relationship between the administration, the faculty and the union, the negotiations may have actually improved those relationships. It is still unclear how much of the better relationship and the better understanding of the university gained by the MGB process will be transmitted to a broader range of people than the negotiators themselves and how long it will last. The prospects, however, seem good. As of now, many months after negotiations have ended, committees continue to meet to improve faculty development and work on health care issues, and the grievance mediation process survived the negotiations.

4) Specific Gains in the Contract

Beyond process and relationship changes, MGB helped produce some specific solutions to problems at Midwest University. I will describe two that were very significant.

If there was any chance of a strike when negotiations began, health care would be the cause. The administration was complaining of rising costs, while the union wanted to protect the right of its members to have a no-premium indemnity insurance plan. This would allow members to maintain flexibility in the choice of medical care providers without up-front costs (the indemnity plan did have deductibles). The subcommittee on benefits looked carefully at the pattern of costs incurred by the university in recent years and were able to discover one particular item that stood out as an expense that was large and rising much faster than the rest: inpatient psychiatric care. Both sides agreed that if they would be able to contain this cost, they would be able to leave the rest of the plan mostly intact. They thought initially of limiting extended psychiatric care to the use of local facilities, not the more expensive out-of-state facilities that many were using, and eventually placed a $10,000/yr. cap on this particular service. The university met its interests--containing costs--while the union interests--preserving freedom of choice for most medical care without co-premiums.

In another case, the university was having a problem figuring out its financial responsibilities to tenured medical school faculty in the face of potential threats to hospital practice income. It took many meetings to untangle the way in which medical school faculty were compensated, because part was from the university and part was from the private practice plans within the university's hospital. Once that was done, they realized that the portion of each faculty's salary presently paid through a university check varied from 20-80%, and it did so in an almost random way. After much discussion, both sides agreed that the tenured portion of a faculty member's salary would be the seniority weighted average of the basic science faculty salaries. This amount would also be what was affected by the percentage wage increase negotiated during bargaining.

These two solutions to problems would not have been possible in a traditional bargaining atmosphere.

FACTORS IN SUPPORT OF MGB

To the degree that MGB worked at Midwest University, what made it work? The initial condition that was essential for implementing MGB at Midwest University was dissatisfaction with the old way of negotiating. The last negotiations were so personally painful for the bargainers that no one wanted to take on the hassle of doing it this time. The people who eventually did negotiate agreed to take on the job only after knowing that the approach to negotiations would be different this time. That led to the second condition that helped Midwest University implement MGB: the selection of people. Most of the people on the bargaining team wanted to use a non-confrontational approach to bargaining. Also, only three had been in negotiations before, so there were few people who carried old habits with them. And finally, the administration consciously chose to assign line rather than staff people to their bargaining team. The team included deans and associate deans who knew the university's operations in great detail, and were or had been academics. They knew personally about the problems being discussed from both a faculty and administration perspective.

The Advantages of Using MGB at a University

A third factor that helped Midwest University use MGB was the very fact that they were an educational institution. University negotiations have three advantages: a belief in ideas, an ability to manipulate symbols, and a balance of the two sides' abilities to manipulate symbols.

If the theory and concepts of MGB are compelling, university faculty will believe in the ideas and try to follow the actions which that theory recommends. There is a basic trust in ideas that is often not present among labor or management in other contexts. When the negotiators at Midwest University were confused about some aspect of MGB bargaining, they would happily refer to Getting to Yes or their own outline and rules from the training sessions in order to find direction. It felt natural for academics to do this. Most business or union representatives, by contrast, do not feel as comfortable letting the achievement of their goals hang on the directive of "academic" theories.

Academics not only believe in ideas, they also know how to assess, understand, and manipulate those ideas. While the negotiators at Midwest University found it difficult, at times, to sort out what was an "interest" and what was a "position," they were able to understand that distinction and could engage in a fair debate about one or another person's use of those categories. To the degree that the ideas of MGB needed to be adapted and fine-tuned, they were capable of doing so.

And, most importantly, those skills were evenly balanced between the union and the administration. Neither side was at a disadvantage when it came to verbal expression or the manipulation of ideas and symbols. Most union negotiators, by contrast, feel that management is better educated, can talk better, and are clever in ways that are hard for them to catch. If that is true, an approach that demands more "talk" will hurt the union. The traditional approach--stopping, caucusing, presenting an idea, then caucusing again--takes away management's inherent verbal advantage. A faculty union does not have this problem: they have no reason to feel insecure when using an approach to bargaining that depends heavily on verbal skills.

Among the examples of mutual gains bargaining that I know about, approximately 60% have been in educational settings. I believe that people in educational settings are both more likely to choose to use MGB, and also more likely to succeed if they choose to try it.

WHAT CAN BE IMPROVED?

To the degree that the process was not successful at Midwest University, why? What can be done better?

Some problems, I believe, are not likely to change. Negotiations will probably be traditional in their last stages no matter what you do. MGB itself is likely to become a chip that is traded in bargaining. Neutral "facts" are very difficult to produce. And, interests, for unions, will always be more specific and position-like than for management. The only answer to these issues is to not set unrealistic expectations so that people are not disappointed.

Other problems are not as intransigent, but still very difficult to manage. The constituent management problem falls into this category. During negotiations, it is essential to keep them informed enough to avoid a backlash, yet, give the negotiators enough freedom to allow them to brainstorm. One way to reduce the tension between these needs is to fully train constituents in MGB so that they know what to expect in mutual gains bargaining. This can be done, but it is usually very expensive and cumbersome. Another approach is to collapse the first and second tables. At certain points in the negotiations at Midwest University, key constituents joined main-table bargaining. This proved to be very helpful.

Improvements can also be made in the training process. Some of the alternatives and options are clear now, even though the results are not. Is it more helpful to convince trainees of the power of MGB ideas, or to drill them in specific behaviors that we know are derived from MGB ideas? Should people be given clear, unambiguous behavioral guidelines, or be left to develop their own version of MGB? Should bargainers be left on their own after training, or is it necessary for the trainers to facilitate the process, at least in the initial stages of bargaining? My opinion as of now is to move more towards the behavioral end of the spectrum: Midwest University bargainers could probably have benefitted from more specific guidelines, and indeed did reach out for guidance at key points in their negotiations.

It is also clear that there needs to be more attention paid in training to the problem of managing the context of bargaining: including constituents and the media.

DO YOU WANT TO USE MGB?

If you are thinking of using MGB, you should first stop and ask yourself: Why? Are you interested in changing the process for its own sake? Are you interested in improving the relationship? Are you interested in producing specific better outcomes? All three can be affected by MGB, but the biggest changes will be in the process and relationship, with some changes in bargaining outcomes. These small changes in bargaining outcomes may be quite significant and enough, alone, to justify the effort to do MGB. The bigger pay-offs, however, are more likely to be long term: if a better process and relationship are developed, you have a better chance of getting many small improvements in bargaining outcomes over many years.

To make MGB work, both sides need to be committed to change, and the negotiators must be strong leaders who are able to manage constituent pressures. The process also depends on a belief in the power of ideas, a belief in rational, reasoned discussion and a balance of verbal and analytic skills. You, in higher education, have the advantage that these beliefs and skills are more likely to exist in your organizations than in most businesses and unions. If you have the commitment to and the leadership for MGB, you have a reasonable chance for success.

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UNIONIZED EMPLOYMENT RELATIONSHIPS: A NEW APPROACH

C. NEGOTIATION MODELS FOR THE 1990's

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My response is based on the experiences I have had as a union president and as a negotiator of college contracts over a long period of time. My experience has been both extensive and narrow, and even though that sounds like a contradiction, it is not. It has been narrow in the sense that all of my negotiations have taken place on one campus. I have this tunnel vision -- this is what negotiations are like on my campus but extensive because over the years, I have negotiated a lot of contracts and best as I can count negotiated contracts with, for, against, in partnership with eight different chief negotiators for the administration of the college so I have some diversity of background, even though narrow.

The range of contracts that I have been involved with have ranged from what would fit the model that Professor Friedman was talking about; contracts that were extraordinarily creative and involved problem-solving techniques that could be the model for mutual gains bargaining. On the other hand, I have also been involved in negotiations that were hostile, destructive, mean, vicious, where friendships over many years were destroyed during the negotiations and even one negotiation which ended up with people wrestling on the ground at 3 o'clock in the morning. How is that for trying to present a rational approach to an irrational subject.

Negotiations are irrational and I think that is part of the reservation that I have about mutual gains bargaining, so I am cautiously optimistic and cautiously pessimistic. I am not sure of how effective it could be. On reflection, some negotiations were very constructive and some were destructive. Incidentally, these negotiations did not necessarily take place sequentially; it is not as if we started out with horrible negotiations and as we got more and more intelligent over the years, reached this ideal plateau. They were varied.

Some years were good and some were bad. There was no real progression that was taking place.

I have tried to think of the factors that entered into causing negotiations to be either constructive or destructive and I think that mutual gains bargaining can be helpful to the negotiating process to the extent that it can impact on the other factors that affect negotiations. I think probably the most important factor that affects negotiations is the climate that exists between the union and the administration, not just as we are going into negotiations, not just the week before or the month before, but all year long. Climates cannot be created artificially. You have to have a climate that exists during the life of a contract that carries you into the next contract.

We have to be concerned about the sort of process that exists between the administration and the union for resolving conflicts. Are they resolved intelligently, amicably or with hostility? Is there an on-going dialogue that takes place between the administration and the union? Is there a labor management committee that functions in an ongoing way so that as issues begin to arise they can be resolved at that point rather than, as so often happens, you save it up until we get to the table and then "boy are we gonna show them." This attitude comes equally from administrations and from unions -- that is destructive. If mutual gains bargaining can help to create the kind of climate that allows for ongoing resolution of conflicts, I think it makes a very valuable contribution.

I think another way of measuring climate is what is happening in terms of grievances. Are there many? What is their nature? Are they petty or are they substantive? Are grievances based on genuine intelligent good faith disagreements of either interpretations or philosophies or, are they petty harassing kinds of issues.

Negotiations is a people process. It is not something that is mechanical. There are people who are involved and these people have egos, and needs, personalities, likes and dislikes, and prejudices. What is the relationship between the personalities on either side of the table? What kind of frictions, friendships, and suspicions exist? Is there a trust or is there distrust? Is there a feeling that you can look across the table and believe the people who are talking to you? Do they have at heart the best interest of the institutions? Are they anti-union or, are they anti-administration? Are they neither? Are they generally concerned with developing some kind of agreement that is helpful, not only to the institution but, at the same time, helpful to the people who work at that institution. The two are not incompatible, they go together. The goal should be to come to agreements that can benefit the institution, to enhance the educational process, and to create an atmosphere that is desirable for the employees of that institution. They work together. I think the extent to which you can create a positive atmosphere is the extent to which you can have a better educational institution.

Is there a willingness on the part of negotiators to accept each other's successes. Are the hostilities such that there is a subtle way of trying to sabotage a good idea only because it is coming from somebody who you are not feeling particularly friendly toward? By not focusing on the issue but on the person who is presenting the issue, you are either for or against the issue, not on the merits but on the presentor. Are there people who are interested in building an empire; that is, is their approach to negotiations to enhance their particular position rather than to present something that is going to be in the best interest of the institution? This works, not only in terms of the relationships across the table but, also in terms of what takes place on the same side of the table. You have the same kinds of personality conflicts both within the administration and union negotiation team. There is empire building and turf grabbing that take place on both sides. I think that this is another area that mutual gains bargaining can help to clarify and put into focus -- what are the goals and what it is that each individual is after.

Professor Friedman mentioned the issue of constituencies and how confusing that can be. Constituencies represent pressure groups and, from the point of view of elected union officials, we have to be responsive to our constituencies. We cannot ignore them -- we cannot say even though you are putting pressure on us, we do not think your pressure is appropriate and therefore, we can ignore you. We cannot do that. There are a lot of different constituencies. Our local represents the following: full-time faculty members, part-time faculty members, classroom faculty members, non-classroom faculty members, part-time and full-time people in each group, classified staff, and part-time and full-time technologists. Everyone of those constituencies have their own individual needs and are making demands that have to be reflected in terms of negotiations. The same kinds of constituencies operate on the part of administration. You have the academic side of the house and you have the administrative side of the house; you have the educators and you have the business people, all of whom are putting pressure on their negotiating team.

Another issue that certainly influences the collective bargaining process are the fiscal conditions. What is the size of the pie that is going to be divided? Is it a good time to negotiate, or is it a bad time? I am beginning to feel that there is never going to be a good time. How many slices of the pie do we have to divvy up? What sort of real deprivation exists in the various constituencies and what kind of comparative deprivations exist? If we have to try to balance inequities in one group, does it mean taking away finances from another group? What is the cost of correcting these inequities, and who pays for them?

Another issue Professor Friedman touched on is who does the negotiations -- line or staff -- internal negotiators or hired guns? What happens when you bring people in to negotiate contracts who are not part of the institution, who do not have an emotional involvement in what happens, who are not aware of the intricacies and the subtleties that exist?

I think, in conclusion, what I would say is that mutual gains bargaining can work. I am not optimistic that it can bring about a revolutionary kind of change that is going to take place, perhaps, in our lifetime. I think what may happen is that as we learn a little bit more about the process of negotiating each time, hopefully, that moves us a little bit closer to an ideal which we may never reach. We are trying to introduce an intellectual process into a highly emotional process and when there is a conflict between the two, my training as a psychologist tells me that the emotional process always wins.

II. ECONOMIC ISSUES OF THE 90's

A. Retirement Options of the Future
B. Faculty Compensation in the 1990's
C. Salary Equity Four Cell
D. Health Care Cost Containment in the 1990's

ECONOMIC ISSUES OF THE 90's

A. RETIREMENT OPTIONS OF THE FUTURE

Clifton Wharton, Chairman
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TIAA-CREF

RETIREMENT: A SOCIAL SEA-CHANGE

Shortly after I joined TIAA-CREF in early 1987, somebody told me what Albert Einstein is supposed to have said when asked what he considered the most powerful force in the universe. Not missing a beat, Einstein said, "compound interest". Coming from anyone in the retirement business, that anecdote has got to be just a little too good to be true. And by way of stretching "compound interest" into another arena -- there is the steadily growing public interest in retirement itself. In the last few years, retirement has suddenly become a very hot topic. In fact, you can hardly pick up a daily paper or a popular magazine nowadays without running into a retirement-related story. The topic may be the growing number of retirees, compared to the active workforce or the population as a whole. It might be the stresses and strains on the Social Security system or the challenges of long-term care.

Maybe the issue is whether corporations should be allowed to use "over-funded" employee pension plans to finance mergers, takeovers, or large-scale capital investments. Or, maybe the issue is proposals to "tap" public pension assets as a way to offset state revenue shortfalls. Or, maybe the question is whether the government should try to discourage what some see as shortsighted corporate management practices by taxing retirement companies on gains made by selling stocks held less than a specified period of time. The sheer size of the dollars involved is enough to light up anyone's eyes. The top 200 public and private pension funds in the country total more than one trillion dollars! What must be remembered is that these dollars are not a collective national asset -- they belong to millions of individuals who sleep -- and work -- better believing that they are safe.

Only a few years ago, all these ideas and dilemmas would have seemed quite novel to most of us. But, now they are rapidly becoming a staple of discourse in the media, in business, in government, and in our daily lives. Why so? Well, undoubtedly there are many reasons intertwined, a kind of cultural sea-change arising from social, economic, political, and psychological developments across a very broad base. Yet, it seems safe to suggest that two reasons are probably more obvious and more influential than all the others.

The first reason is the so-called graying of America. As a nation, we are getting older. Our average age is increasing. Moreover, the numbers of the elderly themselves are increasing, both absolutely and relative to the overall population. In 1985, 28.5 million people were 65 or older. By 2000, the number will increase to 34.9 million, and by 2010, it will be 39.2 million. A dramatic symbol of the change is that the American Association of Retired Persons, some 30 million strong, now has more members than any other U.S. organization except the Roman Catholic Church [Naisbitt and Aburdene, 1990].

The second big factor behind the increased awareness of retirement issues is a kind of classic collision between an irresistible force and an immovable object: The Baby-Boom generation is hitting middle age. If you have been in higher education for a while, you may find yourself experiencing a feeling of _deja vu_. After all, it was the Baby-Boom that changed the face of American schooling. In their early years, and especially during the 1950s, the Baby-Boomers taxed the capacity of U.S. school systems to the breaking point. Then, from the late fifties through most of the 1960s, the pressure of their numbers was the force behind our nation's great surge of investment in building, expanding, and improving our colleges and universities. The Baby-Boomers' disproportionate numbers suggest that their needs will exert a decisive demand on the collective resources of our nation for as long as they are with us. Nor, should we be surprised at their influence on our collective psyche.

In the fifties and the sixties, our national willingness to invest in both K-12 and higher education was no greater than our national willingness to be interested in them; to place them at the top of our agenda for public attention. In the eighties and nineties, more and more Baby-Boomers have left the educational arena behind at last. Now, they are looking to homes, careers, families, and all the other concerns of maturity. And as surely as the needle of a compass swings round to the north, our public sensibilities and, to be sure, some of our public resources -- are clearly registering the change.

RETIREMENT IN HIGHER EDUCATION

So, as we have seen, there is a new level of interest throughout our society in a broad range of questions about retirement. And, we have certainly been seeing some of that interest within the academic community.

I think it is useful to point out that not all the various issues are equally relevant to all persons. For example, if you work for a firm that is anxious for ready cash, you might have reason to be concerned about whether corporations should be able to tap "overfunded" pension plans. (An overfunded plan is one that, using reasonable statistical and actuarial assumptions, has more current resources and expected earnings than it needs to meet its future benefit obligations).

Corporations, as I said, often find this sort of thing tempting for financing mergers, takeovers, and so on. So far, at least, we have not seen a UC-Berkeley trying to absorb a San Francisco State, or a SUNY-Binghamton launching a hostile takeover attempt of SUNY-Oswego...though when budgets get tight enough, anything is possible!

On the other hand, several states are facing fiscal crises. If not this year, then in the near future. In some of them, at campuses where the public employee retirement plan is either basic or an optional coverage, there may be a basis for concern over whether policymakers will be tempted to lower employer contribution rates. And, I believe the same issue has come up at municipal and county levels, which might sound an alarm among those who work for community colleges within such jurisdictions.

Of course, "overfunding" is even theoretically possible only for defined benefit plans. In TIAA-CREF or any other defined contribution system, you need not concern yourself at all with that particular issue because all the "profits" automatically benefit the participants. Underscore again what I said a moment ago: not all the issues affect everyone to the same degree.

What I want to do now is touch briefly on three retirement issues which are, by virtue of their breadth, almost certainly going to affect higher education as a whole. The issues are:

1) the end of mandatory retirement in higher education;

2) faculty retirement demography; and

3) the changing psychological and institutional environment for retirement in higher education.

1. The End of Mandatory Retirement

In 1978, the Age Discrimination in Employment Act essentially made mandatory retirement illegal. But, as you know, the act exempted tenured employees of colleges and universities. The exemption runs out in 1994. After that, faculty, like other employees, will have the right to go on working beyond 65, 70, or even later, as long as they can perform the duties their jobs require. There has been considerable unease in some quarters about the effect this will have on the academic community. A few commentators have predicted the "graying of the college faculty" or even a "glut of aging educators" [Johnson, 1988]. Others, less extreme, have worried about the effect of an aging faculty on the currency of teaching content, as well as on opportunities for hiring and promotion of younger scholars.

But just because faculty and others have the right to work longer does not mean that they will choose to. Over the last several decades, the trend has been toward earlier rather than later retirement in the population at large. Twenty years ago, 86% of men aged 55 to 64 were still working; today the figure is 68% [Bennett, 1989].

The trend has been similar in higher education, and the prospect of no mandatory retirement seems so far not to have catalyzed any dramatic change. In a 1988 TIAA-CREF survey of participants, we asked if being able to work past 70 was causing people to change their retirement plans. About nine percent said they now planned to work longer, and another six percent said the new law had made them less certain about when to retire. But the great majority -- 78 percent -- indicated no change in their expected retirement age.

Currently, of course, a whole structure of incentives and disincentives tends to reinforce the decision to leave the work force at or before age 65. These range from Social Security provisions to the early-out payments offered under many institutional retirement plans. On the other hand, there are also institutionalized structures that reward later retirement. In TIAA-CREF and other defined contribution plans, for example, the effect of earnings compounding is especially dramatic in the later years of savings.

So as you can see, the factors in the equation are numerous, and they do not all point in the same direction. What that suggests to me personally is not that the end of mandatory retirement will be a non-event, but rather that its impact will be more complex and more subtle than many have predicted. I doubt, for instance, that we will develop that "glut of aging educators" on our campuses generally -- though individual institutions may find themselves facing the problem temporarily. Nor, would I expect the uninterrupted continuance of today's pattern of retirements. Instead, I anticipate a new and broader diversity of retirement practices: early retirement for some, later retirement for others, semi- or periodic retirement for others still. And for the academic community as a whole, this will present both problems and possible opportunities.

2. Faculty Demographics

That leads me to a second major issue concerning retirement in higher education: faculty demographics. By all accounts, a disproportionate number of today's faculty are in their late fifties and early sixties. In 1987, a pair of Penn State researchers estimated that up to 20% of the nation's college faculty will retire by 1994, with another 30% leaving by the end of the current decade [Lozier and Dooris, 1987]. That is half of the nation's college and university faculty in the next ten years.

The ACE's Campus Trends, 1989 survey noted that the pace of retirements has already begun to accelerate and the labor market tighten. Of course, the impact of retirements will probably be unevenly distributed across institutions, types of institutions, and disciplines. The ACE predicts more acute vacancy problems in many high-demand fields: 49% in computer science, 38% in business, 36% in mathematics, and 27% in the physical sciences [El-Khawas, 1989]. Other commentators expect the major shortfalls to come elsewhere. For example, Bill Bowen and Julie Ann Sosa [1989] argue the biggest problem areas will be the humanities and the social sciences. (I should note that Bowen and Sosa place more blame on graduate training patterns over the last generation than on imminent retirements).

Well, even with substantial statistical and demographic evidence, what we are engaging in here is speculative. Obviously, there is ample room for disagreement over the details of how things will play out. But, there is also considerable accord on what the broad outlines are likely to look like. As a recent article in AGB Reports put it:

> A substantial number of retirements will occur during a concentrated period, and barring dramatic nationwide action, it is unlikely that the supply of new Ph.D.s will grow to meet the demand....By the mid to late 1990s, every institution is likely to face a rocky and uncertain road. [El-Khawas, 1989]

Assuming this is not too far off the mark, it adds a significant new wrinkle to what we were talking about before: the impact of mandatory retirement. Under the circumstances, the challenge may not be persuading older faculty to leave, but rather finding enough top-notch faculty, of any age, and keeping them on the job.

In higher education, as perhaps in the larger society, we are on the verge of confronting the concrete necessity of paying more than lip service to the ideal of making use of our older citizens and employees.

To do so, we will need a new diversity of employment patterns. Older faculty may tend to prefer part-time or periodic assignments over full-time ones, for example. Specialists may have to shift over to Freshman survey courses if their research involvements and professional currency wane. Established practices concerning rank, promotion, benefits, and literally scores of other matters will have to be reassessed and perhaps, restructured. Orchestrating such changes will require creativity, flexibility, and innovation. And these will be necessary among collective bargaining agents no less than among faculty, staff, and administrators.

3. The New Environment

Over the last 10 or 15 years, faculty and staff attitudes and expectations toward retirement plans have shifted significantly.

The employee retirement plan which used to be considered a "benefit" -- a kind of incidental extra -- has come to be seen by many, if not most, as a central and rightful part of compensation. And among some persons, there has been new interest in exercising greater control over retirement planning decisions. We have seen an increasing demand for more individual involvement and more individual choice. Many administrators and participants have called for more investment alternatives and flexibilities; for more levels and patterns of diversification; for aditional transfer and income-receiving options; for new kinds of service and information; and for a greater say in pension governance. At the same time, basic decisions, once left to campus benefits administrators -- or to the plan provider -- have become the subject of broadly based discussion and demands for participation.

These changes in attitudes and expectations -- what you could call the psychological environment for retirement -- have taken place in a changing institutional setting as well.

In 1978, the federal Employee Retirement Income Security Act (ERISA) made it possible for regulated investment companies to offer tax-deferred annuities. That paved the way for the "for-profit" mutual funds to pursue the retirement market in a new way -- including the higher education retirement market, where previously state plans and TIAA-CREF had operated largely alone. The result? More competition, more diversity -- and certainly more confusion among campus personnel and administrators alike.

But TIAA-CREF has been changing too, as you can hardly help being aware. In 1987, we completed The Future Agenda, a strategic blueprint for the future. Setting out immediately on the course it established, we implemented a money market account in CREF in 1988, an interest-only payment option in TIAA in early 1989, and numerous service and communications enhancements throughout the period.

On March 1, 1990, we launched what is almost certainly the single largest and most dramatic package of innovations in our history. Focusing at this point on the CREF side of the system, we have offered participating campuses the opportunity to select their retirement plans:

* transferability of retirement accounts from CREF to other approved investment vehicles, and from those back to CREF as well;

* cash withdrawals of up to 100 percent of CREF accumulations for employees at retirement or upon termination of employment; and

* two new CREF investment accounts: a Bond Market Account and Social Choice Account.

Again, we have offered these subject to institutional option. Individuals will be able to exercise them only if their campus adds them to the basic institutional retirement plan.

Now, we at TIAA-CREF have devoted a tremendous amount of effort into developing and implementing these new alternatives, and I could happily spend the rest of my time talking about how we view them within the context of our larger system. For that matter, we have other important innovations on the drawing boards, for both the near term and further out, and bringing new flexibility and diversity to TIAA as well as to CREF.

But with your permission, I would prefer to defer any more on these matters and shift toward some more general, but perhaps, more fundamental areas of concern.

DIVERSITY AND RISK

To do that, let me first recap the three broad higher education retirement trends we have covered up to now.

First, the prospect of the end of mandatory retirement in higher education in 1994 raises a host of questions about the when, why, and how long of retirement.

Second, faculty demography reinforces those questions, while adding new ones about who will be retiring in the academic community, how many, in what patterns, and with what impact on a whole variety of teaching and administrative norms.

Third and last, changes in the psychological and institutional environment for retirement have raised fundamental questions about what people want in, from, and for retirement...about their rights and responsibilities in planning for it...and about the roles of campuses and retirement plan carriers in meeting the needs of academic personnel.

Taken altogether, these pose serious challenges. What we are seeing is, on the one hand, a great diversification of opportunity. There are far more options in planning for retirement, investing for retirement, deciding when, how, or even if to take retirement. At the same time, participation in retirement choices...that is, who gets to make them, and with what range of freedom...is becoming much more widespread. Overall, we are seeing what I would call a kind of democratization of practices once organized almost exclusively around institutional and organizational authority. And, I would say that is largely a positive change.

But with greater diversity, comes greater risk. At one level, the risks are the obvious ones to individuals. The right to make choices necessarily entails the possibility -- virtually the certainty, statistically speaking -- that some of the choices will be wrong. Individuals can and will make mistakes. They will retire too early...or too late. They will invest their retirement savings too aggressively...or too cautiously. In retirement, they will live too lavishly or too frugally, draw down their resources too quickly...or hoard them too stringently.

infallible or better equipped than individuals to decide such matters. I merely wish to point out that when individuals assume the primary responsibility, they expose themselves more directly to the full brunt of the consequences of their decisions. For example, take TIAA-CREF retirees who select lifetime annuities as their retirement income option. In doing that, they give up any present or future access to their accumulation principal. But, they can never outlive their retirement income. On the other hand, retirees who took their CREF accumulation and invested (after taxes, of course) in, say, gold mining futures might triple the stake in a year. Or, they might lose every cent of the funds they were depending on to preserve their affluence and independence for years to come.

THE FALLACY OF "CAVEAT EMPTOR"

Now, I suppose one response to that is: "So what? Let those who want to trade responsibility for security do so. And let the activists who are willing to take the risks live with their choices." If you want to be tough-minded, I suppose you can't really rebut that. But, you can have some reservations.

One reservation is that it is one thing to be willing to take responsibility, but something else again to be equipped for it. For example, we at TIAA-CREF often get inquiries from participants who are interested in using "market-timing" services to move their accumulations back and forth between CREF's stock and money market accounts. Many find it hard to believe that CREF itself does not use market-timing strategies, and that we do not know of any person or organization that has ever done it reliably and successfully over long periods of time. But that, indeed, is the case and the most sophisticated investment analysis will confirm it.

People who want to use market-timers are clearly eager to take control of their retirement investing. But, it seems less clear to me that they always have the training, specialized information, and professional experience that would equip them to use that control with full effectiveness.

It is the truth of human nature that most of us are more ready to take risks than face the music if things do not pan out. Somehow, the expected reward always seems more real, more tangible, than the potential failure. So some people will, in fact, run risks whose negative consequences they know they cannot absorb or afford, simply because they are so certain they will never have to. Then, if it turns out that they are wrong, it is all very well for the by-stander to say, "That's the risk they took." But, the effect on the lives of those directly concerned, and perhaps on the lives of many others, can be tragic. And that brings me to another issue, one with quite tangible economic consequences.

Yes, we can, in the abstract, hold individuals fully responsible for their exercises of judgment -- wash our hands, so to speak, and allow them to sink or swim as they will. But in real life, it does not work out quite so neatly.

Private misjudgments have collective costs. We recognize this when we require auto drivers and homeowners to carry liability insurance to protect others, as well as themselves. Similarly, when individuals make misjudgments in retirement planning or investing, the chances are that they themselves will not be the only ones affected. At the very least, families may have to absorb the extra burden of support for those whose private resources have failed. And in recent years, various programs and public policies have developed that, taken together, are a tacit acknowledgment that society itself has an obligation to assume at least that part of the load that the individual and the family cannot shoulder without calamitous result.

So when it comes to retirement, the "caveat emptor" argument only goes so far. And that is because if the "buyer" fails to "beware", that choice will almost certainly affect others, whether for good or for ill. Especially in an aging society, this needs careful thinking. In an economy where the number of retirees is steadily growing relative to the active work force, where most failures of the individual's ability to sustain him or herself in retirement represents a claim on public resources, any dollar spent to maintain those who have left the work force will be a dollar unavailable to invest in those who have not yet entered it. The more public dollars that must be diverted to supplement private retirement resources, the fewer public dollars that will go to Head Start and nutrition programs, schools, colleges, and job-training.

That, to my mind, represents a hard levy of age upon youth, at a time when the young, their share of the population having waned, can afford it least of all. And, it is an aspect of the retirement issue that we in higher education, of all people, can ill afford to overlook.

CONCLUSION

I said earlier that the new visibility of retirement may give some of us in higher education a sense of deja vu, based as it is in the same demographics that put education and higher education at the top of the American agenda a generation ago. Let me suggest another parallel, or at least potential parallel. During the 1960s and early 1970s, higher education went through a period of tremendous growth. The number of people participating, the number of institutions, the number of programs and purposes -- all these increased dramatically in a relatively short period. Accompanying growth was a parallel diversification: a proliferation of individual and collective goals and purposes. Career preparation gained ground on liberal education. Priorities shifted among teaching, research, and public service. Clearly, educational goals increasingly competed with extraneous social, political, and ideological agendas. And for a period that perhaps has not entirely come to a close, the basic mission of colleges and universities became, at once, more prominent and less clearly defined among the major institutions in our society. During this period, higher education had to learn or relearn a basic lesson: it could not solve all problems.

Today, as retirement issues become increasingly prominent and retirement investments play a growing role in our nation's economy, I think it may be important for employers, employees, and their retirement plan carriers to take that same lesson to heart. The more actively individuals participate in their retirement planning and investing, the more different kinds of opportunities their employers and retirement plan carriers make available, the greater the tendency to blur, or even erase, the critical differences between retirement investing and the speculative, current-income-oriented investing of discretionary income. The difference is not difficult to understand. In fact, one of TIAA-CREF's new publications puts it in downright folksy language: "Don't play poker with your eating money." But being easy to understand does not necessarily mean that everyone will abide by it. The greater the rush toward speculation, toward moving funds rapidly from one vehicle to another to maximize short-term gains, toward unexamined innovation of all sorts, the more likely an individual is to lose sight of a basic truth:

> However different people are, and however different the things they want out of retirement, a private retirement plan will be for most people one of the two or three most important income sources following retirement.

Retirement savings are investments. But, in at least one key respect, they are different. Retirement investments are investments you cannot afford to lose. That means that retirement investing follows different, and, in many ways, more stringent, criteria than any other kind of savings. Its focus should be long-term rather than short-term. Its diversification must be broad-based to minimize volatility, especially as the time approaches for income to begin. And, the reliability of the organizations that manage it must be above reproach.

Just as retirement investing is different, so retirement in higher education is different from that in many other fields. There is, for example, the issue of portability: any retirement plan in higher education ought to be compatible with sabbaticals and with movement between campuses. It ought to work equally well for employees who want to retire early, late, or in unconventional patterns -- all of whom, if current trends continue, seem likely to increase in the years ahead.

Okay. I have been statesmanlike so far, so now I finally get to make the pitch. One system does it all -- TIAA-CREF. TIAA-CREF is the nationwide, unified system for our nation's colleges and universities. Serving education is what we do. It is all we do. It is all we want to do. And, we have done it well enough to grow into the world's largest private retirement system, with current assets of more than $84 billion. We have been here for more than seventy years. And, seventy years from now, we will still be here. When it comes to your retirement...your future...and that of your colleagues -- isn't that the most important thing you need to know?

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ECONOMIC ISSUES OF THE 90's

B. FACULTY COMPENSATION IN THE 1990's

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The ideas and opinions which I offer today are my own and do not necessarily reflect those of my organization or any other. My discussion will center on differential salaries in higher education in a collective bargaining setting. By differential salaries, I mean different salary levels according to discipline. To some extent, salary determinations are market driven. The cost of living and other economic factors such as supply and demand generally form the basis of salary structures, whether in a collective bargaining format or not. Not just incidentally, much of the research which purports to show that salaries for unionized faculty are not consistently higher than salaries for non-unionized faculty ignores the infuence of collectively bargained salaries in driving non-unionized faculty salaries higher.

The issue of differential salaries according to discipline is specificaly a creature of the marketability of certain Ph.D.'s in fields where the corporate sector is offering ever increasing starting salaries and other incentives to recruit the best people coming out of our colleges and universities. We now find a new Ph.D. in history, for example, might be offered an annual salary in higher education in the twenty thousand dollar range if he/she can find a job at all, while someone with a degree in marketing can choose among several job offers in the private sector, and in higher education, with starting salaries ranging from fifty to eighty thousand dollars. In the public sector, according to the Oklahoma State University Office of Institutional Research, in the 1989-90 academic year, a new assistant professor in business management received on the average almost $19,000 more than a new assistant professor in education, $20,000 more than a new assistant professor of history, and $20,500 more than a new assistant professor in the visual and performing arts. This presents a host of equity and recruitment problems for all of us in higher education. Most salaries in higher education, with the exception of schools of medicine and law, are not discipline specific. In some institutions, schools of engineering have adopted higher salary schedules in order to remain competitive. Should we -- or really must we -- construct salaries by discipline in accordance with the demands of the marketplace? If we don't, how do we compete? One answer is to establish salaries for the entire professoriate which are competitive with those in the corporate sector, so that a professor in any discipline would earn as much as private industry is offering to certain graduates. While this is arguably the best solution to the problem, its attainment is unlikely in a society where education receives most of its support rhetorically rather than financially.

Faculty unions are being accused of holding all salaries to the same level and thus, inhibiting the ability of certain disciplines to recruit top quality people in competition with industry and non-unionized colleges and universities. Unions have a statutory obligation to equally represent everyone in their collective bargaining unit. They do, however, also have the right to make judgments which may result in different treatment for groups within their constituency, as long as the judgments are not unlawfully discriminatory or arbitrary. Thus, there are no statutory barriers which would keep a union from bargaining salaries differentiated by discipline.

Let us consider some of the problems associated with the concept of different salaries for different disciplines which, not only a faculty union, but also a reasonably enlightened institutional management, must face. First of all, what happens when the market changes? Is it reasonable to assume that salaries in a discipline which is no longer in great demand can be lowered by the amount they were raised to meet the competition? Doesn't history teach us that this flux in the marketplace is a very reasonable possibility? Secondly, inasmuch as salary level is one of the principal factors in establishing status in our society, do we really want to say to the world that we value English literature less than computer systems analysis? Do we want to say to each other and to our students that learning for financial reward is more important than learning for personal and intellectual enrichment? Are we in higher education prepared to join forces with the corporate sector in encouraging our most able young people to shy away from the humanities in order to enter more lucrative fields? Thirdly, given our resources, can we ever really compete with the corporate world in salaries?

I believe there are measures that can be taken to alleviate the competitive disadvantage many colleges and universities are facing without destroying the equilibrium established within the concept of equal salaries across the disciplines. For those disciplines in which the competition is fierce, especially with other institutions of higher learning, I suggest special support for research -- both by financing it and by reducing teaching loads, plus guaranteed summer programs. I would also advocate hiring at or near the top of existing salary schedules where such exist, and hiring at higher ranks, if necessary. Early tenure for certain candidates may also prove helpful. These are extensions of practices in use in the academic world to attract particularly desirable faculty regardless of discipline. Some institutions may be able to offer help in faculty housing. In the New York City metropolitan area, even modestly subsidized housing may well be more important than thousands of dollars in salary. The point is that these incentives, while significant, do not necessarily become part of a structure which is too rigid to be responsive to changes while, at the same time, maintaining a semblance of equity in the salary structure.

I am not suggesting that we do what the baseball owners did and got caught at. That is, to have an agreement among all accredited institutions, which just might be collusory, to stop the competitive head hunting which results in relatively astronomical starting salaries only a privileged few can afford. If no academic institution succumbed to the practice of inflating salaries for certain disciplines in order to recruit quality graduates, probably many of those very same graduates would come to academe anyway because of the many desirable attributes of the academic setting, such as vacations, work schedules, sabbatical leaves and even collegiality, which are rarely as attractive in the corporate world.

Each of the proposals I have put forward could, to some extent, respond to the ebb and flow of the market demand. In order for these suggestions to succeed for any given institution, however, its basic salary schedule must be attractive enough to be competitive with salaries being offered around the country in the traditional disciplines.

In summary, it is clear that we have a real problem. Satisfactory solutions are difficult to come by. Establishing higher salaries for certain disciplines beyond the established fields of medicine, law, and, in some places, engineering, would further bifurcate the profession; yet, the inability to recruit high quality new faculty in all the disciplines is a threat to our very fiber. As a unionist and faculty advocate, I would look for the establishment of incentives which would not destroy basic salary equity for all disciplines. Our union at CUNY, the Professional Staff Congress, has established Distinguished Professorships which are available in any discipline, and extra steps at the top of every salary schedule which are available on a longevity basis to all, but can also be used for recruitment of new faculty. We have also established a program of research grants and scholar incentive leaves. Our contract allows for hiring at any rank on any step of the schedule. We must do more, in my opinion, but we must do it with the well-being of all whom we represent in mind. I believe these concerns are synonomous with the academic health of higher education and the well-being of our society.

ECONOMIC ISSUES OF THE 90's

C. SALARY EQUITY FOUR CELL

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INTRODUCTION

Over the last three decades, the proportion of women and minorities in the workforce has greatly increased. This growth has brought about a widespread popular focus on salary equity issues. All demographic indications are that women and minorities will become an increasingly large proportion of the wider workforce and the higher education workforce. As a result, we will experience increasing pressures to monitor salaries for race and gender related inequities and to adjust them when appropriate. The decentralized nature of higher education salary setting creates a situation where such assessments are not only necessary, but necessary on a periodic basis. Short of rigid centralization of hiring and promotion and salary setting, there is no onetime fix that can keep race and gender based salary disparities from occurring. Four salary assessments are presented in this paper that I believe institutions of higher education should conduct on a periodic basis.

Salary equity issues have been broadly conceptualized in two categories, equal pay for equal work and equal pay for comparable worth.[1] Equal pay for equal work prohibits wage discrimination if women and other protected class persons are doing the same or essentially similar work as white men. The policy of equal pay for work of comparable worth evolved to address wage discrimination that is a by-product of occupational segregation. This policy requires that different jobs of equivalent worth to the employer be paid the same. It seeks to assess the extent to which jobs traditionally done by women and minorities have been systematically undervalued relative to what they would have been paid if they had been done by white men. It does this by comparing traditionally female and minority jobs with those requiring similar skill and responsibility levels that are traditionally done by male non-minorities.

Both of these issues can be conceptualized in relation to both the faculty and non-faculty employees of institutions of higher education. Using a two-by-two table with Equal Pay and Comparable Worth on one axis and Faculty and Non-Faculty on the other axis, I attempt to clarify the conceptual differences between equal pay for equal work and comparable worth issues for both faculty and non-faculty employees. This is not easy. There are gray areas and I welcome feedback regarding the distinctions I am trying to make. I also provide a brief methodological description of how the existence of race or gender based salary inequities can be explored in each cell in the table. Where possible, I give some examples of how these topics have been looked at by some U.S. and Canadian institutions of higher education.

THE SALARY SETTING PROCESSES IN HIGHER EDUCATION

As a background, I describe in this section the salary setting processes commonly used in the wider work force that mitigate against salary inequities. Most large employers in the private sector, and essentially all large employers in the public sector, have centralized hiring and salary setting processes. This has lead to relatively uniform hiring and salary setting procedures across different departments and units. This uniformity is created by the processes of classification and job evaluation. Ideally, the process of classification prevents problems of equal pay for equal work or within job class salary inequities. Ideally, the process of job evaluation prevents problems of unequal pay for comparable worth or between job class salary inequities.

The process of classification is used to group similar individual positions into job classes or titles. The important job content of different positions is collected, usually through a questionnaire or interviews. Positions requiring similar skills and having similar tasks are grouped together into classes such as clerk typist, accountant or grounds keeper. Classification errors occur. In fact, a lot of 'grievances' are about such errors. To the degree that classification succeeds in grouping similar jobs together, equal pay for equal work is assured. Salary is linked to the job class and not the individual position or the race or sex of the individual in the position.

Salaries are linked to classes through the process of job evaluation. Job evaluation procedures are used to rank hierarchically job classes for the purpose of assigning salaries. They rank different classes by using common job content characteristics like the levels of education needed and the levels of responsibility involved. The result is that specific entry level salaries and longevity steps are tied to each job class. Ideally, job classes with similar levels of skills and responsibilities are given the same value, regardless of the race and gender of those doing the jobs. If this ideal were reached, job evaluation would assure equal pay for comparable worth. Unfortunately, biases are incorporated into these processes that keep them from reaching this ideal. See Steinberg and Haignere (1987).

Although classification and job evaluation processes are present in some form on most campuses, departmental autonomy in hiring and setting salaries is staunchly defended in the name of academic freedom. The result is that the hiring and salary setting processes are decentralized. Great leeway is given to academic departments and administrative units in the hiring of faculty and professionals, and to a lesser degree, in hiring support staff and physical plant employees.

For non-faculty, a salary range may be specified, but these are commonly wide ranges. For instance, there are six professional pay rates at SUNY. The pay range, i.e., the difference between the lowest and highest paid positions in each rate, varies from $14,000 at pay rate 1 to $24,000 at pay rate 6. While classes may be assigned to a pay rate, there are no specified entry levels. Thus, different units may hire people with very similar job duties and experience at substantially different salaries. A job title assigned to pay rate six could conceivably be paid $24,000 more in one unit than the same job title in another unit.

During the last two years, I have assisted two universities in Ontario with pay equity analyses. At these schools, most of the positions in the support staff and professional/managerial units are tied individually to salaries. There has been no attempt to group positions based on common job content. This situation is a typical one. Many campuses have hundreds and even thousands of positions that are individually assigned salaries with no attempt to categorize or classify similar jobs. For the personnel administrators at these universities, the thought of having to do classification, i.e., cluster jobs with common job content into titles or classes is a nightmare. To do so would set out stark salary inconsistencies.

In the hiring of faculty, departments have even more autonomy. The institution usually approves the faculty lines and sets broad salary ranges.[2] But, the department negotiaties the actual salary with the individual filling the position. If the department really wants the candidate, they can usually convince the institutional officials to come up with more money than originally specified for the line. Frequently, one input to this process is what the person specifies as their salary requirement. Because of the internalization of maarket bias against women's work, many women will specify a lower salary than a male candidate. Thus, women and men with equal qualifications may be hired at the same rank for different salaries. These initial salary rate differences are exaggerated by percentage increments across the board and any gender bias that may occur in the allocation of discretionary awards.

Decentralized individualized hiring, promotion and salary assignment processes need not be gender and race biased. But, in a society where, until recently, race and sex have been acceptable as reasons for paying people less, biases may creep in where there is little systematic oversight and few checks for consistency.

Correcting this problem may not require rigidly centralized classification and job evaluation systems. But, with the increasing proportion of women and minorities in the workplace, there will be continued pressure to monitor salaries for inequities and make any necessary adjustments. To do a thorough job of this, institutions of higher education need to assess both equal pay for equal work and comparable worth for both the faculty and non-faculty, i.e., all four cells of our two-by-two table.

CELL A - FACULTY AND EQUAL PAY

Of our four cells, this is probably the most examined at institutions of higher education. This cell asks the question: Do equally qualified faculty members doing equal work get paid the same regardless of gender or race? Answering this question involves defining "equally qualified" and "equal work". Some common definitions of equal qualifications include:

1. Highest Degree
2. Date Highest Degree was Awarded
3. Years of Service to the Institution
4. Years of Relevant Experience
5. Department Chair or Other Administrative Title Experience
6. Initial Rank at the Institution

Some common definitions of equal work include:

1. Rank
2. Discipline or School
3. Department
4. Contract Length (10 month, 12 month)

These definitions, along with gender and race information, are frequently the research variables used to answer the question of equal pay for faculty. A statistical technique called regression analysis is used with salary as the dependent variable. The results of this analysis indicate whether there are any salary differences related to sex and race once all of the variables measuring qualifications and work are controlled. One way of doing this is to calculate the average dollar amounts paid to white men for a particular career profile. These averages can then be used to calculate what women and/or minorities would be paid if they were white men.

As I indicated, this analysis is a fairly common one. The variables defining equal qualifications and equal work vary depending on the information available and what variables are considered appropriate for inclusion. Debates concerning

Table One

EQUAL PAY AND COMPARABLE WORTH

	Faculty	Non-Faculty
Equal Pay	Cell A Faculty and Equal Pay	Cell B Non-Faculty and Equal Pay
Comparable Worth	Cell C Faculty and Comparable Worth	Cell D Non-Faculty and Comparable Worth

the appropriateness of variables such as rank and department chair and administrative title are on-going, since these variables can, in themselves, include gender bias. If hiring and promotion are biased against women and minorities, controlling for rank and administrative title causes an underestimate of inequity in salary. (P.K. Morse in Pezzullo and Brittingham, 1979; Schrank, 1977; Schrank, 1985; Scott AAUP).

Another debate involves whether or not the analysis is flawed if information concerning publications, teaching skills and grants is not included. If such information is readily available, it is best to include it. However, this information is hard to collect and hard to quantify (Schrank, 1988). Even without direct indicators of these measures, they may be controlled indirectly through variables such as rank, time in rank and discipline. If disparities in salaries between white males and women and minorities are due to differences in publications, grants and teaching skills, we would expect women and minorities to have lower average scores on these factors than white men. To my knowledge, there is no evidence to support this, once rank and other qualification variables are controlled.

Among other places, faculty equal pay studies have been done at the University of Connecticut (Geetter 1988) and the Memorial University of Newfoundland (Schrank 1988). At both universities, female faculty were found to be paid about $1800 less on average than male faculty with similar qualifications. Queens University of Kingston, Ontario, is currently conducting a similar study and the University of Western Ontario is planning such a study.

CELL B - NON-FACULTY AND EQUAL PAY

This is one of the two less examined cells in our table. This low incidence of equal pay assessments is not only characteristic of institutions of higher education, but also of the wider workforce. This cell asks the question: Are equally qualified non-faculty employees doing equal work paid the same regardless of gender and race? Here again, as with the faculty, answering this question involves defining "equally qualified" and "equal work".

"Equally qualified" may involve many of the same variables as faculty. These include:

1. Highest Degree
2. Date Highest Degree was Awarded
3. Years of Service to the Institution
4. Years of Relevant Experience

Establishing what constitutes "equal work" varies in complexity depending on the sector of the workforce being considered. For the support staff and physical plant employees, doing "equal work" may simply mean they are in the same job title or class as described earlier, e.g., clerk typist, library assistant, grounds worker II, stationary engineer. Physical plant and support staff classes are likely to have fixed salary setting systems which make "equal work" both easy to define and may preclude many equal pay for equal work problems. By this, I mean that all those hired into a class receive the same entry level salary and salaries are only adjusted by longevity steps and across-the-board increments.[3] As a result, for the support staff and physical plant employees "equal work" is easily defined and race and gender salary disparities are unlikely to occur.[4]

By contrast, higher level professional jobs are likely to have more fluid salary setting processes. The hiring processes for positions such as assistant to the dean, laboratory director, academic counselor, and research associate are likely to give more weight to individual qualifications than the requirements of the job. The result is highly individualized salaries. There may also be greater opportunities for sex and race to be among the individual characteristics considered.[5] If this is so, why haven't more studies focused on examining equal pay for equal work for non-faculty titles?

In part, the answer to this question lies in the acceptance of decentralized hiring and individualized salaries by those in higher education institutions. However, it also is due to the difficulty of defining "equal work". Commonly, different job titles are used for each individual position, or the same title is used with parentheses attached to designate the difference, e.g., asistant to the dean (engineering), assistant to the dean (arts and science). If these two assistant to the dean titles are defined to be "equal work" and are held by people of different genders or races, an equal pay for equal work problem could exist. Such a problem would be correctly categorized in our Cell B. If differences in their qualifications, such as the length of time in title, do not account for any salary differences, salary adjustments may be in order. If these two assistant to the dean positions are defined as different jobs then the question of any salary disparities is rightfully a comparable worth question and would be categorized in our Cell D.

In four of the ten Canadian provinces, laws ostensibly designed to address comparable worth, i.e., Cells C and D, have required institutions of higher education to confront the question of what is "equal work" for non-faculty jobs (Cell B). For instance, Ontario Bill 154 requires that female job classes be compared to male job classes in all public and private sector employers with more than nine employees.[6] A job class is defined as:

> those positions....that have similar duties, responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates (Section 1 (1)).

This focus on job class comparisons has made the lack of classification for most non-faculty positions in higher education highly visible and potentially problematic. The legislative expectation that positions with similar duties, responsibilities, qualifications and recruiting procedures will be combined into a specific class and receive the same salary carries with it the possibility of making visible salary differences that could be hard to justify. Some institutions have sidestepped this classification issue by calling each position a single incumbent class.[7] However, others have recognized the necessity to create classes where they have previously not existed. In doing so, they are addressing equal pay for equal work issues.

Most notably, Carleton University in Ottawa has chosen to use a statistical technique called cluster analysis to group common positions into job classes. To do so, they have collected job content information through a 43 page questionnaire with over 300 closed-ended questions and data items. This extensive information will be analyzed sttistically by a procedure called cluster analysis. The result will group positions with common job content. The degree to which positions in a cluster diverge in salary could constitute an equal pay for equal work analysis.

Aside from the problem of defining "equal work" where classification is either non-existent or "loose", equal pay for equal work for non-faculty can be examined in much the same way as described for the faculty in Cell A. A regression analysis can be done with the dependent variable of salary. Job class can be used as a measure of "equal work", replacing the rank and discipline variables used in the Cell A faculty analyses. Department or functional unit could also be used. It is not advisable to use pay ranges, since these are, by definition, directly related to the dependent variable of individual salaries. The "equal qualification" variables listed at the beginning of this section should be entered into this statistical analysis along with these "equal work" variables.

CELL C - FACULTY AND COMPARABLE WORTH

Two-by-two tables commonly have a weak and a strong diagonal. This one is no exception. Cells C and B are much less examined than Cells A and D. This may surprise you, since I have just indicated that institutions of higher education in Ontario and Manitoba have come under the pay equity (i.e., comparable worth, see footnote 1) legislation. However, most of the salary equity analyses for faculty that have resulted from these laws have been Cell A equal pay studies instead of a comparable worth analyses.

The problem lies in the fit between the legislation and the makeup of the faculty ranks. The purpose of the Ontario Pay Equity Act is to ensure that jobs traditionally performed by women are paid the same as equally valued jobs traditionally performed by men. Thus, the legislation calls for the comparison of male and female classes to establish which ones are of equal levels of skill and responsibility.

What constitutes a female dominated faculty class? Is a specific rank like assistant professor a job class? Or, is it a specific rank within a school or department, like all the instructors in arts and science or English literature? If we conceptualize ranks as classes, e.g., all lecturers, instructors, associate professors, we are unlikely to find any that are female dominated.[8]

When we look across disciplines, we find that higher education faculties, even those associated traditionally with women's work such as social work, teaching, and library sciences, tend to be less than 60% female. Many are gender integrated, but some are actually male dominated, i.e., more than 70% male. One consistent exception to this is the faculty of nursing which is usually more than 90% female. Other frequent exceptions are home economics and data processing.

With these few exceptions, the gender composition of most faculty ranks and disciplines does not fit the current conceptualization of comparable worth. The faculties of most institutions have been considered either a single male dominated job class, or a family of male dominated classes with ranks like assistant professor and professor forming the classes. Thus, no comparable worth comparisons are made internal to the faculty.[9]

But, what if we move away from the conceptualization of comparable worth in terms of just male and female dominated classes. The tendency for disciplines with higher proportions of women to have lower salaries is widely recognized. This pattern has led to speculation that salary differences often attributed to "the market" may actually be related to gender bias against fields with more women (Braskamp, et al, 1978; Pezzullo and Brittingham, 1979). Recently, (Staub, 1987) has directly examined this question using data from the National Faculty Survey from 1974 to 1985. Her findings indicate a strong consistent negative relationship between the number of women in the discipline and salaries. Moreover, her time series analysis suggests a decline in salaries in fields where the numbers of women have substantially increased.

Despite the lack of faculty comparable worth assessments, they clearly can be done. Comparisons between the scarce female dominated disciplines (e.g. nursing and home economics), and male dominated disciplines can be done using the same methods discussed below concerning Cell D. Moreover, regression analyses using percent female in the discipline as a continuous variable can be conducted. Such an analysis could indicate the relationship between the percent of women in a discipline and the salaries paid to that discipline with all other relevant pay related factors controlled. Comparable worth salary adjustments for each traditionally female discipline could then be made based on the regression coefficient for percent female.

CELL D - NON-FACULTY AND COMPARABLE WORTH

In response to legal mandates, comparable worth studies for non-faculty job classes have taken place at all higher education institutions in Manitoba and Ontario. In the U.S., the University of Minnesota has also done a comparable worth assessment of non-faculty classes in response to pay equity legislation. Other higher education institutions have examined comparable worth for non-faculty job classes as a result of union/management negotiations or in response to political and popular pressures.

As previously indicated, comparable worth ignores within class job differences and focuses on job differences between classes. In researcher language, the job class is the unit of analysis. This cell asks the question: Do female dominated non-faculty job classes receive lower salaries than male dominated non-faculty job classes with similar levels of skills and responsibilities and under similar working conditions?

To answer this question, comparable worth research uses job evaluation to establish similar levels of skills, responsibilities, and working conditions. As described in the beginning of this paper, job evaluation hierarchically ranks jobs for the purpose of assigning salaries. Point factor job evaluation systems are usually used for the purpose of comparable worth because they quantify the worth of jobs with points.

Point factor job evaluation systems generally come in two types: those that are predetermined or *a priori*; and those that are statistically derived. The statistical approach has commonly been called policy capturing. *A priori* systems have existed for half a century, while statistically derived systems have primarily been refined in the last 10 years. Statistically derived systems regress job content information against existing salaries to estimate what female job classes would be paid in the absence of gender bias. Two universities in Ontario, Carleton and the University of Western Ontario, have used a statistically derived approach to comparable worth comparisons. The high level of statistical expertise available at many universities makes in-house statistically derived comparisons attractive.

Point factor job evaluation identifies common denominator job content components (factors) that are used to compare different job classes. Examples of common job content factors are the education required, managerial skills, supervisory skills, interpersonal skills, physical effort, and working conditions. In all cases, these factors measure what is required of those working in the job class and not the characteristics of the individuals in the job class. Salary is attached to the requirements of the job class, not individual skills.

The relative importance of each factor is established through factor weights that can be simply understood as some factors give more points than others. Points are assigned to each job class on each factor by determining the appropriate level based on its job content. In other words, each of the factors has incremental steps.[10] For instance, the education factor usually has steps from low education requirements of less than a high school degree to high educational requirements of a post-graduate education. If the job content of a class requires only a high school degree, that class would be ranked on the appropriate step on the education factor and assigned the points associated with that ranking, e.g. 87 points. If the class requires a post-graduate degree, it would be assigned to the highest rank and be given the highest points, e.g. 264 points. The points assigned from all the factors are added to provide one summary figure of job worth for each job class. Ideally, these systems make the values of a specific employer, company or jurisdiction explicit and provide a procedure for systemically ordering jobs into a wage structure.

Salaries have been set in the manner described above using *a priori* point factor job evaluation systems since World War II. It has been estimated that two-thirds of the employees in the U.S. are subject to some form of job evaluation (Treiman and Hartmann 1981:71). If these systems have been in widespread use for half a century, why is comparable worth an issue today?

In practice, these systems have been vulnerable to pervasive cultural stereotypes concerning the low value of activities performed by women and minorities. Most traditional job evaluation systems ignore important job content of female dominated jobs such as care-giving in hospitals and institutional settings or clerical information management. Many job content factors are defined in such a way that female dominated job classes can only score low values. For instance, exposure to hazards factors commonly include injuries from falls or machines, but do not include exposure to communicable diseases such as AIDS and hepatitis. Moreover, in many cases job evaluation systems are used to justify existing salaries. Few realignments are expected or desired. For more details on how biases get incorporated into job evaluations, see (Steinberg and Haignere, 1987; Remick, 1984, Treiman and Hartmann, 1981 and Acker, 1989).

Concerns about gender biases in traditional job evaluation systems led those at the University of Minnesota to develop their own *a priori* system of factor and weights. Through employee committees and surveys, they incorporated the values of the university employees whose jobs would be evaluated. The results showed, on average, male dominated classes were being paid $2.37 per job worth point while female dominated classes were being paid only $1.81. Salary adjustments ranged from 4% to 16%. (Beuhring, 1986).

Some brief examples of the results of comparable worth studies at universities in Ontario are:

- At the University of Toronto 2500 employees in 33 job classes received increases from 4.6% to 44.7%.
- At the University of Waterloo, most clerical employees received salary increases of about $4000 annually.
- At the Queens University, most of the employees in the Staff Association bargaining unit received an annual salary increase of about $1755. Researcher at Queens received a similar amount and Nurses received an increase of $1870.

- At the University of Western Ontario, all those in female dominated job classes received a $3261 annual increment.

CONCLUSIONS

Demographics indicate that, in the future, there will be more women and minorities in the workforce at large and in both faculty and non-faculty higher education jobs. These increasing numbers will add to the existing pressures to search out and eliminate gender and race based salary inequities.

I have attempted to begin a dialogue on four types of analyses that should be conducted by higher education institutions and bargaining agents. I have discussed some difficulties in doing these analyses. Despite these difficulties, both equal pay and comparable worth analyses can be done for both faculty and non-faculty. Such analyses should be done at regular intervals. Periodic checks assure that undetected and uncorrected race and sex-based salary disparities do not get exaggerated over time through across-the-board increments.

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ENDNOTES

My thanks to Beth Johnson, Administrative Coordinator, for examining a sample of the National Center's collective bargaining agreements to estimate the proportion that have salary maximums related to rank.

[1] The term "comparable worth" has been replaced in popular usage by the term "pay equity". This linguistic evolution was brought about in an attempt to broaden the concept beyond a gender issue to encompass pay equity for everyone. In this paper, I use the earlier terminology of comparable worth in an attempt to avoid the confusion of using the similar terms "equal pay" and "pay equity".

[2] Approximately one-third of organized higher education institutions have fixed salary maximums as well as minimums for each faculty rank. In only a few cases are these maximums discipline specific, i.e., related to the market differences between disciplines. Since they attempt to allow for market differences between disciplines, these specified salary ranges tend to be very broad.

[3] What is ignored here, of course, is the channeling of women and minorities into low worth or low paid jobs. This is an affirmative action issue which is not addressed by equal pay.

[4] In public sector institutions and where these positions are union represented, physical plant and support staff classes are likely to have centralized salary setting systems. When these jobs are non-union and/or private sector they are likely to have more decentralized salary setting systems, i.e., different departments or disciplines may be able to hire secretaries, janitors, etc. at different salary levels.

[5] This situation is paralleled in the wider private sector workforce. Each person is hired at a salary jointly negotiated between the individual and those doing the hiring. Salary information is highly secret and there are no Equal Employment Opportunity Commission (EEOC) reports to provide the information needed to assess equal pay for equal work. If the private sector were required to make salaries public, we might find that equal pay for equal work salary disparities are common, even though illegal.

[6] Under the legislation, a job class is considered female if it is more than 60% female. A job class is considered male if it is more than 70% male.

[7] Given the classification requirements of the Ontario Pay Equity Bill, it remains to be seen whether or not the Pay Equity Tribunal will uphold complaints against pay equity plans that sidestep classification.

[8] An exception may be full-time non-tenure track instructor or lecturer ranks. Most higher education institutions do not have such ranks, but, if they exist, they may be more than 60% or 70% female.

[9] Interestingly, this definition could raise the question of equal pay for equal work. As I indicated earlier, the criteria for determining a job class under the Ontario legislation are that the duties and responsibilities, qualifications, recruiting procedures and compensation schedules are similar. If all assistant professors are considered a male dominated class, can lower salary scales for nursing and home economics faculties now be questioned in Ontario on an equal pay for equal work basis?

[10] The increments between steps usually increase as the scale goes up.

ECONOMIC ISSUES OF THE 90's

D. HEALTH CARE COST CONTAINMENT IN THE 1990'S

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THE COST OF HEALTH CARE

I would like to talk about why it is essential that we bring health care costs under control, especially in cooperative ways rather than the adversarial ways we have used in approaching this problem in the past. The bottom line is that the old ways we have done things have not been successful enough. We have not gotten health care costs under control. And we will discuss how we are not only in tough shape in terms of where medical care costs are -- we are in much worse shape when you look at where medical care costs are headed. We have seen lots of organizations work in joint, cooperative partnerships in an effort to get health care costs under control. And, I assure you, it is much more effective this way than if we continue to seek cost controls only through the collective bargaining process. This is not to say that the collective bargaining process is inappropriate -- that certainly should still go on since there are some things we won't be able to resolve in a cooperative manner.

With that as background, let me talk about where medical care costs have been, where they are, and where they are going. There are three major ways we look at costs of medical care in the United States: a per capita basis, what the nation spends, and a percentage of the Gross National Product. In the 1960s, we spent $200 per person on medical care. In 1988 (the last year we have full government statistics available about these expenditures), we spent $2,100 per person -- a 10 times greater expenditure on a per capita basis than in 1965. Are we getting 10 times more or 10 times better medical care, or is the price 10 times higher? Unfortunately, it is mostly that the price is 10 times higher, since the medical care that was rendered in the 1960s was pretty darn good -- and certainly not 10 times worse than today.

Medical care costs in the United States have grown from about $40 billion dollars in the mid-1960s to about $540 billion dollars in 1988. In 1989, these expenditures will be seen as close to $600 billion dollars, and worse, in 1990, we will probably spend somewhere around $660 to $670 billion dollars. Although most people do not realize it, probably the most serious concern is the portion of the Gross National Product that is spent on medical goods and services -- a little over 11%, and that is rapidly headed towards 12%. Today's 11%+ is up from about 5.9% back in the mid-60s. It is bad enough in terms of what this means for the nation (because it diverts away moneys that we could otherwise be spending on construction, agriculture, national defense, education, or other things. But, this growth also has an effect on the total compensation paid by our organizations -- the combination of the direct pay and what we used to call "fringe" benefits (medical care, vacation, paid time off, legally required benefits, etc.). If, for example, the total compensation pie can only grow by 5% in any given year, and medical care (which is becoming an ever greater fraction of that) grows by greater than 5%, what do you think happens? Nothing extra is added from outside the pie. What happens is that as medical care grows faster than the rest of the pie, it comes almost always out as reduced direct pay.

Although we have a serious situation in terms of where medical care costs have been and what they cost now, we have an even more serious situation, when we consider where they are going. Based on reasonable statistics, you do not have to be a rocket scientist to recognize that if you are in a 6% trend or a 12% trend, that sort of trend is likely to continue into the future unless some counterbalancing trend comes along (and we do not see anything like that on the horizon for medical care). Medical care costs for the nation have increased by about 12% annually over the past 20 years or so. Underlying inflation has increased about 6%. It has not been too tough to predict how much medical care costs could be expected to increase each year. All you had to do was say, "How much is inflation going to be?" Then, multiply inflation by two and you were pretty close to how much medical care costs would increase in the next year.

However, we cannot even use the past trend of 12% to project today's medical care costs in order to determine what medical care costs may increase to in a couple of decades. Even a 12% national medical care cost increase expectation is understated for private sector plans like yours and mine. Health Research Institute has been surveying all types of medical plans every two years since 1978. That top dotted line shows how much medical care costs have been increasing during the time we have conducted the biennial survey. These 1,500 plan sponsors employ more than 50% of the workers in the United States. The average annual cost increase for these plan sponsors has been 14.5%, not the 12% the nation has experienced. What do you think accounts for the difference between national medical care cost increases of 12% and major plan sponsors' costs of 14.5%? The answer is the old "C-S" words -- cost-shifting. Government plans (Medicare, Medicaid, and so forth) are ratcheting down on their expenditures more than private sector plans have been able to. The result is about a 2.5% points of cost shift from national budget expenditures to plans like ours.

We need to think about how much medical care costs might go up for plans like ours in the future. I am an optimist, but I do not use 12% very much anymore because that is the cost curve the nation is experiencing. Major plan sponsors' and plans like yours may be in a 15% curve. In fact, I will bet there are many of you who would be happy with a 15% cost increase this year because you have been hit repeatedly with increases larger than 15%. To the extent your increases are larger, your picture looks even worse.

ESCALATING COSTS

Are there any factors expected to evolve that suggest even higher cost increases in the future? You bet. Hospitals' excess capacity, medical malpractice, underlying inflation, lack of preventive care, and similar factors have helped get us to where we are. But there are new, additional factors that were not included in the historic 12% cost increase trend we have been in. I want to touch on several of them:

1. Plan-to-plan cost-shifting. Most of you who are here do not have what would be characterized as a mega-plan -- a plan that has tens of thousands of employees in it. Those companies who have thousands of employees in their plans have benefits staffs as large as the number of people in this room working hard at controlling their health care costs. And as we know, everything that falls from the sky rolls downhill. So, if major plans put teflon on their roofs (by controlling their health care costs), then not all of the costs shifted from public plans land on their roof any more. It lands on someone else's roof. Today, unfortunately, these costs dump on medium and smaller employers' roofs like yours.

2. The aging of the population. There is no demographic factor more related to medical care costs than age. There are about 25 million people over age 65 today. By the time we are all out looking for a place to go fishing, somewhere in the neighborhood of 2010 or 2020, there will be about 55 million people over the age of 65. This can only increase costs well above past levels.

3. New illnesses. Think back. When was the first time you heard about two new kinds of illnesses -- Alzheimer's disease and AIDS? There may be as many as a million or a million and a half people in the United States who have AIDS and there are somewhere between 25 and 35 million people who will suffer from Alzheimer's over the next 10 years.

Even if medical care costs go up at "only" 12% for the next two decades (the same rate they have over the last two decades), then by the year 2010, we will spend $5.5 trillion on medical care. Compare that to the entire national debt today at $2.6 trillion! However, conditions will likely get worse because of AIDS, Alzheimer's, aging, new illnesses, etc. If the trend is only 3% worse, and medical care costs go up at 15% instead of 12%, then we will not spend $5.5 trillion dollars -- we will spend $10 trillion on medical care. That is a one-year expenditure which is four times today's entire accumulated national debt.

But these are national numbers. How much will your own costs increase? There are two multiplier numbers you can use to give you the answer of what you will spend in two decades if medical care costs continue to increase at 12% or 15%. For example, surveys show today's medical care costs for plans like yours are somewhere in the neighborhood of $2,500 per employee per year. If your cost per employee was $2,500, and medical care costs increase at 12% annually, all you have to do is multiply what you are spending today by 11. In other words, at a 12% annual increase, you will go to the bargaining table and negotiate over $27,500, just for direct medical care costs, in 2010. If medical care costs go up at 15% instead of 12%, the multiplier becomes 20. Then, if you are spending $2,500 today, you will bargain about $50,000 -- just for medical care costs -- in 2010.

All of this is within our career span so this is the type of planning perspective we need to be looking at. Twenty years ago, we could not imagine medical care costs would increase at 12%. And we are where we are because nobody had the foresight to examine what would happen if medical care costs increased at these rates of growth.

COST CONTAINMENT APPROACHES

Not happy with these cost prospects? Neither are we. So, I am going to quickly cover some categories of actions you might consider taking to curtail these cost increases. It is not enough just to talk about the problem or that costs are getting out of hand. We need to talk about solutions.

The key solution is for labor and management to understand the seriousness of this problem, and to work together to bring health care costs under control. Yet, the singular thing that keeps labor and management from accomplishing this is an over emphasis on cost-sharing. When we get at loggerheads over the issue of cost-sharing, we cannot take the hundreds of other steps that do not involve any cost-sharing or cost-shifting.

Use of payroll deductions is one of the ways some organizations are helping bring health care costs under control. Management often says, "We need contributions because this is a defensive measure. If we have no family contributions, as soon as another company introduces the use of family contributions, people will drop the other plan and migrate into our plan." And this is happening all over the U.S. because of dual wage-earning families. So, if your plan has no or very low contributions for families, you are being selected against by your fellow employers who are increasingly introducing contributions or raising them.

Point of service cost-sharing is another cost control device. What do you think the average size of the deductible is in the U.S.? It is about $250 to $300. That is a lot different from the past. When people have two places where they could be covered and when the employers' plans are comparable (as far as the payroll deductions are concerned), they will choose the plan with the richest benefits and lowest deductible. So, if your plan has a $100 deductible, and the other plan has a $250 deductible, they will drop the other plan and migrate into yours.

Administrative measures like coordination of benefits, eligibility audit, pre-existing conditions, and claims administration cost reductions are other possible proven effective steps that should be considered. Also alternatives to inpatient care should be discussed. Ambulatory surgery, pre-admission testing, home health care, birthing center coverage, and hospice care are excellent ways to ensure that people are not using a hospital when a hospital is not necessary.

Quality needs to be enhanced as well. Second opinion programs that work are very important. And the non-insurance company utilization review vendors have better ways of dealing with effective second opinions and unnecessary utilization controls than ever before.

Many of your plans may not have managed care techniques like pre-certification, concurrent utilization review, and especially, case management. If your plans do not have these features, it is not too late this morning to add them. They do not diminish the value of the benefit. They simply control health care costs by controlling unnecessary utilization.

In conclusion, we should be seeking to achieve win-win solutions. You create a win-win solution when nothing comes out of the employee's or the stockholder's pockets, but yet, health care costs are controlled. The medical care system has been getting along just fine. It is time for them to share some of the effort in bringing health care costs under control.

So what is the best solution? Ultimately, it is healthy people using the system less. Inadvertently, we have created a medical care delivery and financing system oriented around acute care. We wait until a person really gets banged up, has the heart attack, or gets cancer, before we try to do anything about it. Then we use high-cost, high-technology medicine -- the best in the world -- on a person that the medical system gets too late. In this country, we spend 97% of the $670 billion on aftermath care, and less than 3% on anything that could be stretched to be called prevention, health promotion, health improvement or wellness. It simply does not make any sense. If we had it to do over, we would not design a system with today's systems failures.

But, let us pretend we are doctors for a minute. If I stood here and said to you, "Hey! There's $670 billion in two sacks here on the floor. There is 97% of $670 billion in one sack, and 3% of $670 billion in the other sack. You are welcome to walk up and pick up whichever sack you would like -- but you can only pick up one of the sacks." Which sack are we going to pick up? There is no question. We are going to pick up the one with 97% of $670 billion (acute and chronic care, but not prevention).

WHAT CAN BE DONE?

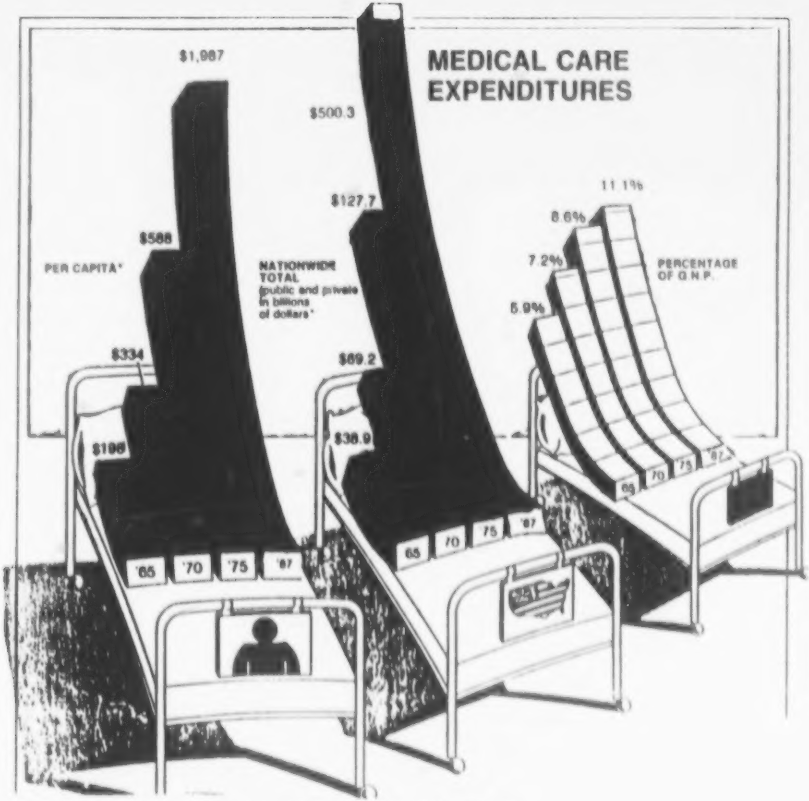
Yes, we have to change and restructure the system, but, what can we do? The first step is to recognize the seriousness of the problem and what needs to be done. The second is to determine what we are doing now. Do we have employee involvement in one way or another -- quality circles or something like that? Do we have a forum or setting where we could gather people together and say let us look at getting health care costs under control. If you do not have something already set up, then form something new.

Get labor leadership and company leadership together and say "We've got to solve this problem. We can do it much better jointly than we can separately." And bring everyone together. Help everyone understand the problems. Identify some of the possible actions. Set your mission and objectives and plan implementation. Then implement and measure.

What I have just described is a proven effective planning process and it is the best first step in controlling medical costs. Tom Peters, a well-known management critic, says that the American planning process can best be characterized by three words: "Ready! Shoot! Aim." Obviously, the difficulty with that approach is that too much of the time we shoot ourselves in the foot before we get the gun out of the holster. The problem is that in our efforts to control health care costs, we grab tools or cost-control techniques (and shoot!) without having any well-defined and jointly agreed to sense of where we are trying to go with these tools. That is completely wrong and counterproductive.

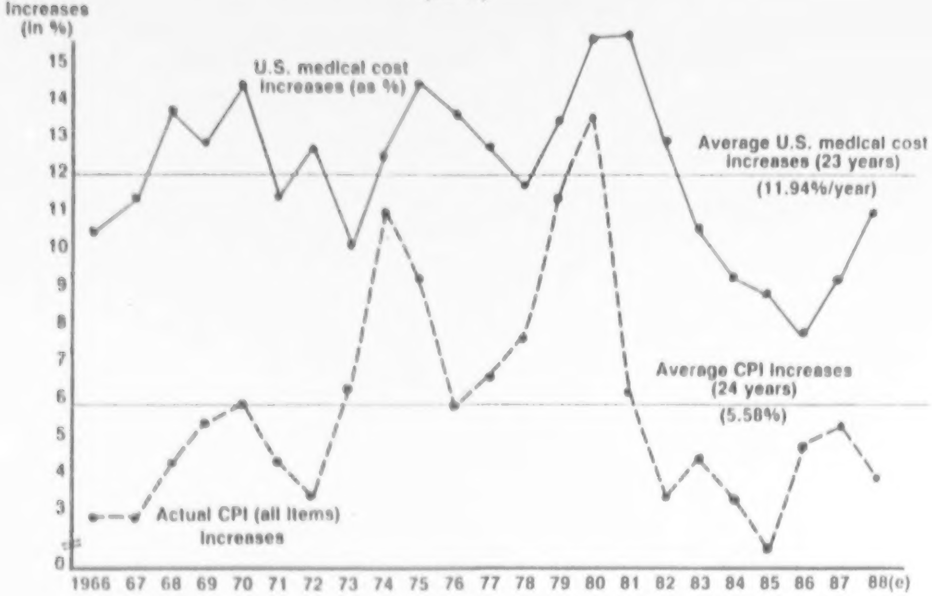
For us to be able to plan effectively, we need to take at least a two-decade perspective. We need to ask ourselves various questions. Are we trying to deal only with short-term health-care costs or should we also deal with medium- and long-term health care costs? Are we willing to get involved with people's lifestyles and behaviors? (When you think about it, lifestyle is the genesis of most of the medical care costs we are having to deal with). How willing are we to go head-to-head with the medical system and the hospitals? Once these planning decisions are made (and you have them down in writing), then you have got commitment and accountability. And you will have a plan that will work. Labor and management can be far more effective working together to get health care costs under control than if they work either unilaterally or only through the collective bargaining process.

HEALTH CARE COST CONTAINMENT IN THE 1990's

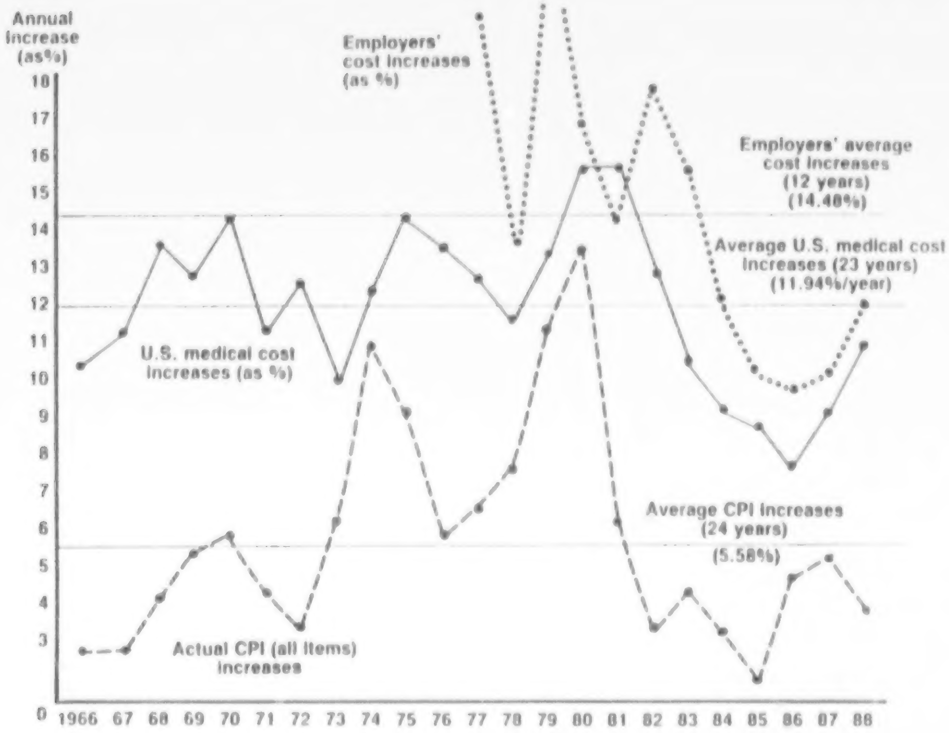


Source: *Health, United States*, 1988 report compiled by the National Center for Health Statistics

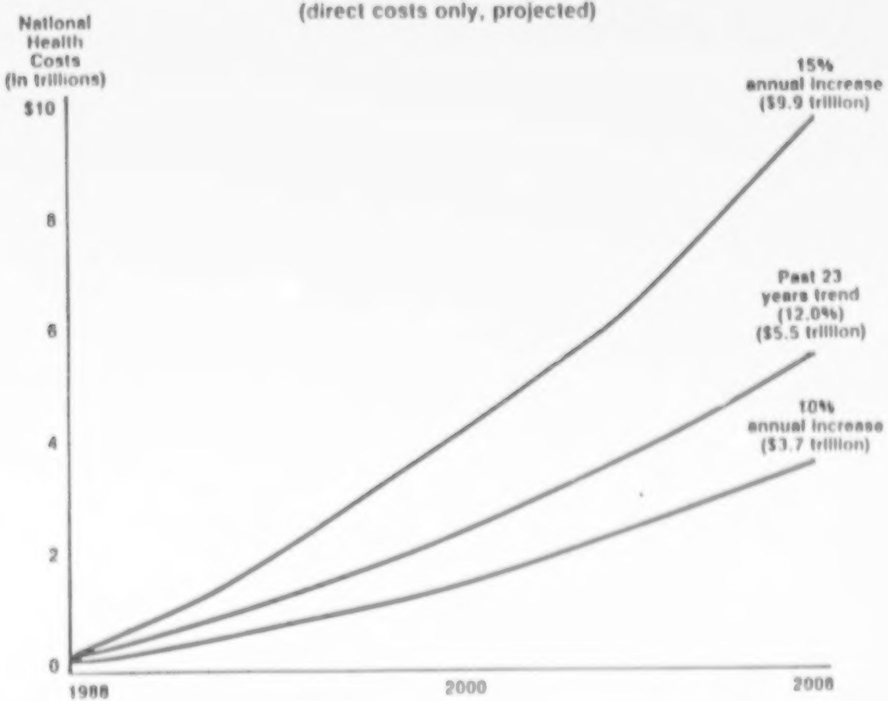
National Medical Care Cost Increase: 1965-1988
Compared To Overall Inflation (CPI All Items)
(as %)



Employers' Medical Care Cost Increases Compared to National Medical Care Cost Increases and Inflation (CPI all items) (as % increases/year)



Future Health Care Costs
(direct costs only, projected)



FACTORS CAUSING NATIONAL HEALTH CARE COST INCREASES

Overall inflation
More utilization
Insurers' make-up pricing
Malpractice
Hospitals' excess capacity
Inefficient management of diseases
Public-to-private cost shift
Lack of preventive care

FORCES DRIVING TOMORROW'S COSTS

All of the above plus:
- Plan-to-plan cost shifting
- Aging of the population
- New illnesses
- Fewer workers to support retirees
- HMO/PPO practices
- Research and technology
- Chronic, long-term care

The Keys to Success in Labor/Management Health Care Cost Control Efforts

Vital Ingredients

- Awareness about the problem
- Appreciation for the depth, breadth, and complexity of the problem
- Sensing the seriousness of the situation
- Involvement by all parties
- Developing a cooperative strategy

Pitfalls

- Communications breakdown
- Overemphasis on cost shifting/cost sharing
- Recogniton that plan design (alone) will not be effective in controlling health care costs
- Timing
- Risk/success sharing
- Expectancy
- Lack of data, unwillingness to share data
- Language and perceptions
- Lack of policy, joint objectives
- Insufficient perspective

A Good Planning Process

Step 1: Assess the state of present cooperative efforts
Step 2: Meet to discuss possible future actions
Step 3: Educate all parties involved about cost containment opportunities
Step 4: Choose to create a joint labor/management committee to control employee health care costs
Step 5: Form working subcommittees Like:

- Organizational (temporary)
- Cost/Data Analysis
- Plan Design
- Education/Communications
- Legislative/Provider Liason
- Health Improvement
- Special Situations
- Others as needed

Step 6: Set organizational policy
Step 7: Initiate and implement actions
Step 8: Measure, monitor, and report results

CONTROLLING EMPLOYEE HEALTH CARE COSTS: WHAT WORKS, WHAT DOESN'T

A. Payroll deductions
  - Forms:
    - Flat (employee only or employee and family)
    - Percent of pay
    - Length of service variations
    - Pre- versus post-tax
  - Rationale
  - Prevalence
  - Means
  - Effect

B. Point of service cost sharing (plan design)
  - Forms:
    - Deductible(s)
    - Coinsurance, copayments
    - Non-covered charges
    - Comprehensive plan design
    - Stop-loss provision
  - Rationale
  - Prevalence
  - Means
  - Effect

C. Administrative measures
  - Forms:
    - Eligibility, internal processing audits
    - COB determination
    - Pre-existing conditions
    - Cost of claims administration
    - UCR/R&C limits
  - Rationale
  - Prevalence
  - Means
  - Effect

D. Alternatives to inpatient care
  - Forms:
    - Ambulatory surgery
    - Pre-admission testing
    - Home health care
    - Birthing centers
    - Hospice
  - Rationale
  - Prevalence
  - Means
  - Effect

E. Quality Enhancement
  - Forms:
    - Second/third opinions
    - Utilization review audits
  - Rationale
  - Prevalence
  - Means
  - Effect

F. Competition
  - Forms:
    - HMO's
    - PPO's
    - EPO's
    - Expanded in-house care
    - Psychiatric HMO
  - Rationale
  - Prevalence
  - Means
  - Effect

G. Managed care
  - Forms:
    - Precertification
    - Concurrent utilization review
    - Post-hospital discharge audit
    - Outpatient utilization review
    - Case management
    - Psychiatric utilization review, case management
    - Substance abuse
  - Rationale
  - Prevalence
  - Means
  - Effect

H. Prevention/wellness
  - Forms:
    - Early detection
    - Prevention
    - Health improvement
    - Wellness
  - Rationale
  - Prevalence
  - Means
  - Effect

I. Others
  - Forms:
    - Incentive-based systems
    - External efforts
    - Evaluation/reporting
    - Information/communications campaign
    - Health status adjustments
    - "All-benefits" cost control strategy
  - Rationale
  - Prevalence
  - Means
  - Effect

III. LEGAL ISSUES OF THE 90's

- A. **Life in the Academy After University of Pennsylvania v. EEOC**
- B. **Confidentiality and the Tenure Review Process After University of Pennsylvania v. EEOC**
- C. **Anti-Discrimination Law and Academic Freedom After University of Pennsylvania v. EEOC**
- D. **Keeping Academics Out of Court: Judicial Responses to Faculty Litigation and How to Avoid It**
- E. **Campus Bargaining and the Law: The Annual Update**

LEGAL ISSUES OF THE 90's

A. LIFE IN THE ACADEMY AFTER UNIVERSITY OF PENNSYLVANIA v. EEOC

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of University Professors

THE ISSUE OF DISCRIMINATION

When philosopher William James retired from Harvard University at the early part of the century, he reportedly stated that thereafter he would be free to live "for truth pure and simple, instead of for truth accommodated to the most unheard-of requirements set by others."[1]

The January 9 decision of the United States Supreme Court in University of Pennsylvania v. EEOC[2] brought both blessings and burdens to American higher education. This paper will offer a preliminary assessment of effects of the decision.[3] Assuming the reader to have a basic acquaintance with the court's ruling and its reasoning, I will focus primarily on the future impact of the case in two areas: discrimination claims by unsuccessful candidates for tenure and the defense of academic freedom. The blessings of the decision for future discrimination litigation are manifest, while the burdens on the future defense of academic freedom are weighty.

The decision will probably have effects in other practical areas as well, including the solicitation of external review letters and the conduct of internal appeals over tenure denials. I commend to your attention for advice on these (and other) matters the ongoing work of an AAUP joint subcommittee of Committee W on the Status of Women in the Academic Profession and Committee A on Academic Freedom and Tenure.

A sober reminder about the extent of discrimination problems in higher education serves as a useful introduction. AAUP has documented that the salary gap between women and men professors increased from 1975 to 1988. The wage gap for full professors, for example, rose from 9.2% to 11.8% during this period. Rates for tenure are similarly discouraging. While the percentage of male faculty who are tenured rose slightly between 1975 and 1988 from 64% to 69%, the proportion of female faculty with tenure remain unchanged at 46%. Even more troubling is the disproportion of women in non-tenure track positions; of full-time faculty, 18% of women as compared to only 7% of men hold temporary, "folding chair," or other non-tenure track appointments.[4] The situation of minority faculty is similar. See Tables 1 and 2.

William James, as quoted above, found the assessment of scholarly achievement to be based on the "most unheard-of requirements set by others." Many women and minority candidates who are denied tenure may believe that among those unstated requirements are membership in the white race and the male gender. Serious obstacles confront their efforts to challenge negative decisions on grounds of discrimination. Social obstacles include alienation from colleagues and impairment of prospects for obtaining future positions. Legal obstacles range from filing deadlines to subtle problems of proof that the decision was not an honest exercise of professional judgment by peers. The subjective and highly specialized nature of professional evaluations is perhaps, the most serious hurdle to be overcome.

Faculty discrimination plaintiffs have prevailed in only about 20% of the reported judicial decisions, according to the study by George LaNoue and Barbara Lee.[5] It may well be that institutions settle the stronger claims out of court, leaving only the weaker ones to be tried. Nonetheless, the odds appear to be against the plaintiff.

ACCESS TO FILES

Among the litigation hurdles faced by unsuccessful tenure candidates before the Supreme Court's January ruling was obtaining access to confidential peer review materials relevant to the tenure decision. In virtually every lawsuit over tenure denial, the faculty plaintiff seeks to review these materials, to complement evidence of discrimination that might be available from other non-confidential sources. The EEOC, too, requests access to confidential materials when its investigators pursue faculty discrimination complaints. The federal courts of appeals had been divided on the appropriate legal standard to be used to judge demands for such materials. The appeals courts in Philadelphia and Atlanta had ordered the materials turned over routinely, while the courts in Chicago and New York had called upon the plaintiff to make some preliminary showing that discrimination may have tainted the review, to overcome the presumption of confidentiality of peer reviews. The latter standard was the one fashioned by AAUP in 1980, in its *Preliminary Statement on the Judicially-Compelled Disclosure in the Nonrenewal of Faculty Appointments*.[6] This was the standard that AAUP unsuccessfully urged the Supreme Court in *University of Pennsylvania* to adopt. AAUP's brief *amicus curiae*, which was a non-aligned brief filed in support of neither party, sought a balancing between the vindication of civil rights and the need for a measure, but not absolute, confidentiality in peer reviews.

Table 1

Salary Differentials between Men and Women Faculty For All Types of Institutions

	1975	1988
Professor	9.2	11.8
Associate	3.8	7.4
Assistant	3.8	9.5
Instructor	4.5	7.4

Source: 1988 Report of Committee W on the Status of Women in the Academic Profession, see footnote 4.

Table 2

Percentage of Full-time Faculty Earning $30,000 or More

White men	42.7
White women	8.8
Minority men	4.1
Minority women	1.2

Source: "Equal Pay in Higher Education," A Background Paper Prepared for the ACE Task Force on Equal Pay in Higher Education Advisory Commitee Meeting, May 9, 1990, at page 3.

Prior to the Supreme Court ruling, these conflicting circuit court decisions forced plaintiffs in many cases to expend valuable time and resources litigating over the proper legal standard to be applied to their requests for files. The first blessing of the high court's decision is that it eliminates further litigation over the legal standard. The Supreme Court, exercising one of its major responsibilities, resolved the "conflict in the circuits," to promote uniformity in the application of federal laws around the country.

A GENEROUS STANDARD

A second blessing for the unsuccessful tenure candidates is that the standard adopted by the court is generous to them. The court's resolution entirely favored the individuals claiming discrimination, and the EEOC acting on their behalf. The ruling clarifies that access to the candidate's files and those of relevant "comparators," similarly situated successful candidates, must routinely be made available.

In the wake of the Supreme Court's decision, will a higher proportion of faculty plaintiffs win their cases? While one hopes the success rate will improve, I do not view the Penn decision as contributing substantially to this result. Most plaintiffs in faculty discrimination cases already had access to the files, whichever prevailing legal standard had been applied to their requests. Justice Blackmun, in his Opinion for the court, suggested that "if there is a 'smoking gun' to be found.....it is likely to be tucked away in peer review files."[7] Yet, I cannot offhand think of one discrimination decision favorable to a plaintiff in which direct evidence of discrimination was found in these files and played a central role in the outcome.[8] Justice Blackmun's assumption appears unwarranted, and some have even suggested that the peer review files are rather the least likely place for direct evidence of discrimination to be found.

An earlier celebrated case over disclosure of files involved Franklin & Marshall College and after the EEOC had obtained and reviewed a large number of faculty personnel files from the college, the Commission concluded that further pursuit of the case was not warranted. It is perfectly understandable for faculty plaintiffs and the EEOC to seek access to files. The court's liberal standard for that access will eliminate the need to relitigate the question endlessly, saving time and resources, but I do not see it as otherwise substantially easing the enormous difficulties of proving discrimination against faculty members.

At the same time, I view Penn as substantially undermining the legal protection for academic freedom. While reaffirming some continuing vitality for the doctrine, the court set new and harsh limits on its reach. The court characterized a series of earlier precedents which I hold dear as the "so-called" academic freedom cases, as if doubting the concept.[9] I believe the Penn decision can be fairly, and unfortunately, read to allow governments to encroach on universities and colleges unless their actions directly usurp course content or other central academic decisions. I am confident that other agencies of the federal government, state executive agencies, and state legislatures will rely on this decision in actions to compel universities to reveal information. When does a "mere" demand for information ever pose a direct usurpation of course content? Virtually never, I believe. While many observers would agree that the EEOC is a "white hat" agency, the constitutional analysis in the Penn decision will apply equally to the FBI, the CIA, the state troopers, and other arms of government which might not be as warmly received in the university setting.

The impact of the decision will not, I believe, be limited to government demands for university information. Governments encroach on universities in many nasty ways that have no direct impact on course content or other academic matters. The Penn decision will now play a role in struggles such as the staging of controversial plays in university theaters, the display of radical art in university museums, and the official recognition accorded to controversial student groups. New reporting obligations and taxation may be justified on the basis of the decision. What interference, short of mandated course content, would constitute a direct usurpation? I am hard pressed to find an answer. Forgive me if I sound like a doomsayer, but I view the decision as very harmful to the legal protection of academic freedom. A distrust of government lies behind the bill of rights, and the Penn decision gives me no cause to rest easy.[10]

SUBPOENA ENFORCEMENT POWER

If we have identified the EEOC as a "white hat" government agency, let us turn finally to that agency's role in enforcing its subpoena power. The EEOC is in a position voluntarily to exercise appropriate restraint in wielding its broad powers recognized by the Supreme Court. What would constitute appropriate restraint? I would encourage the Commission to establish guidelines that would require EEOC investigators to make some preliminary judgments before issuing subpoenas for confidential information. They should request, and also analyze, other information before demanding peer review materials that were solicited or created with an express or implied expectation of confidentiality. The non-confidential information generally includes statistical data, salary information, resumes for the candidate and relevant "comparators," and anything else not considered by participants in the peer review process to be confidential. In demanding confidential information in files of others beyond the complaint, particular care is warranted. Subpoenas for faculty files other than the complainant's should be precise rather than scatter-shot. The complainant should be asked to justify the selection of other individuals as comparators. Comparators might be limited to individuals who received tenure in the same department or division, within a limited time period of perhaps three years. When the EEOC does obtain confidential information and reveals it to the complainant, the Commission should insist on generous protection for the privacy rights of third parties, including the comparators and the individuals who evaluated them. One might consider notice of the disclosure to the outside authors of confidential letters of review. With safeguards such as these in place, my parade of horribles would not apply to the EEOC's subsequent use of the *Penn* decision. Whether the EEOC, or other government agencies might be encouraged in the exercise of self restraint remains to be seen.

ENDNOTES

1. Quoted in book review by Gene I. Maeroff of *Killing the Spirit*, New York Times Book Review, March 18, 1990, p. 27.

2. 110 S. Ct. 577 (1990).

3. The views expressed are those of the author and not necessarily those of the American Association of University Professors.

4. These figures are reported in "Academic Women and Salary Differentials," from the 1988 Report of Committee W on the Status of Women in the Academic Profession, *Academe*, July-August 1988 at 33-4.

5. G. LaNoue and B. Lee. *Academics in Court* 236 (University of Michigan Press, 1987).

6. *Academe*, February-March 1981, p.27.

7. 110 S.Ct. at 584.

8. In conversation on this point, Professor Barbara Lee recalled that in *Zahorik v. Cornell University*, 729 F.2d 85, 89 (2d Cir. 1984), the court referred to the contents of Professor Zahorik's tenure review file. Judge Winter noted that the file included evaluations that were highly favorable, mixed, and highly critical, as well as a reference (by someone who abstained from voting) that Professor Zahorik was too "feminine." Professor Zahorik did not, however, prevail in the litigation.

9. 110 S. Ct. at 586.

10. R. Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment," 76 Calif. L. Rev. 297, 334 (1988).

LEGAL ISSUES OF THE 90's

B. CONFIDENTIALITY AND THE TENURE REVIEW PROCESS AFTER UNIVERSITY OF PENNSYLVANIA v. EEOC

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The decision of the United States Supreme Court in University of Pennsylvania v. EEOC[1] addressed one narrow discrete issue out of the many issues which fall under the rubric of academic freedom. Like so many judicial resolutions of complex issues, this decision leaves many questions unanswered and invites attention to alternative approaches to the problem that was raised. Part I of this paper reviews the reasoning of the Supreme Court in rejecting the University's claim of evidentiary privilege for confidential academic peer review material. Part II then ofers a brief analysis of the rationale of the court's decision and the practical impact of the decision on the tenure decision-making process. Finally, the paper briefly considers other strategies and options for preserving confidentiality and academic independence in the wake of the University of Pennsylvania decision.

THE UNIVERSITY OF PENNSYLVANIA v. EEOC DECISION

The University of Pennsylvania decision arose out of an investigation by the Equal Employment Opportunity Commission (EEOC) of a claim by a faculty member that the university's decision to deny her tenure was based on gender and national origin bias. The university willingly complied with the EEOC's investigatory requests, except for "confidential peer review materials" consisting of two categories of documents: (1) peer review evaluations and letters from academicians both inside and outside the university; (2) documents reflecting the deliberations of the university's peer review committees.[2]

The university argued that academic freedom, protected by the First Amendment, provided the university with the right to determine, through proper academic standards, who will obtain tenure and thus "who may teach".[3] In addition, the university asserted that the peer review process -- by which the university faculty, together with the larger academic community, set the academic standards by which scholarship is judged -- is central to a rational tenure system:

> Peer review ensures that those members of the faculty who will have a lifetime appointment to shape and be shaped by the university are of a quality and dedication that merits the extraordinary protection tenure affords.[4]

Finally, the university urged that "[i]n order for the peer review process to function, the university must be able to provide meaningful guarantees of confidentiality and thereby to obtain candid and detailed comments about the tenure candidate."[5]

It is important to note that the university did not argue that such material should be absolutely exempt from disclosure. The university readily conceded that the "EEOC has a compelling interest in the elimination of all invidious discrimination," and that the case therefore involved a "conflict between two important societal values."[6] In fact, it was the EEOC that had taken the absolutist position:

> The EEOC has never asserted that it has any need whatsoever for the documents in question: to the contrary, its consistent position is that it is absolutely entitled to insist upon full disclosure, regardless of the injury to the academic community caused by disclosure or the importance of any competing interests which counsel against disclosure.[7]

The university urged that a qualified privilege be recognized, both as a matter of constitutional and common law, under which confidential peer review materials would be protected "from court-ordered disclosure unless the government could make a particularized showing of why it believes that those files likely will contain evidence of discrimination or why the files are otherwise needed."[8]

The Supreme Court rejected the university's position. Turning first to the claim of common law privilege, the Court began by noting that Congress, "in extending Title VII to educational institutions and in providing for broad EEOC subpoena powers, did not see fit to create a privilege for peer review documents."[9] Although the court did not question the university's assertion "that confidentiality is important to the proper functioning of the peer review process under which many academic institutions operate," it held that the costs associated with disclosure "constitute only one side of the balance."[10] The Court noted that disclosure of such materials often "will be necessary in order for the Commission to determine whether illegal discrimination has taken place." Thus, in light of the Congressional silence on the issue, the Court declined to recognize a common law privilege that might interfere with the EEOC's compelling duty to "ferret out" invidious discrimination.

The Court also suggested that recognition of such a common law privilege would "lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society [including] writers, publishers, musicians [and] lawyers..."[11] Because the Court "perceive[d] no limiting principle in [the university's] argument," it determined that it would "stand behind the breakwater Congress has established": unless the statute provides otherwise, the EEOC may obtain all 'relevant' evidence".[12]

CONSTITUTIONAL ISSUES

With regard to the constitutional claim of academic privilege, the Court held first that the university's reliance on case law involving First Amendment protection for academic freedom was "somewhat misplaced". According to the Court, its "academic freedom" cases involved government attempts to control or direct the content of the speech engaged in by the university or those affiliated with it."[13] In this case, by contrast, the burden on the university's academic freedom rights was neither "content-based nor direct."[14] Thus, the court viewed the university's claims as demanding an "expanded right of academic freedom to protect confidential peer review materials from disclosure."[15] Although the court professed that it was "sensitive to the effects that content-neutral government action may have on speech" and it recognized that indirect burdens "may sometimes pose First Amendment concerns," the Court concluded that "the First Amendment cannot be extended to embrace [the university's] claim."[16]

First, the Court reasoned that "the [First Amendment] infringement the university complains of is extremely attenuated."[17] For example, the Court stated that it "doubt[ed] that the peer review process is any more essential in effectuating the right to determine 'who may teach' than is the availability of money." Because "a university cannot claim a First Amendment violation simply because . . . [government] regulation might deprive the university of revenue it needs to bid for professors . . .," neither would the court recognize what it believed to be an equally "attenuated" claim for First Amendment protection of confidentiality.[18]

Second, the Court held that the constitutional claim, "[i]n addition to being remote and attenuated . . . is also speculative."[19] Even if confidentiality is important to some colleges and universities, "some disclosure of peer evaluations would take place" even under the university's proposed balancing test.[20] Thus, the Court reasoned, "the 'chilling effect' [the University] fears is at most only incrementally worsened by the absence of a privilege." Moreover, the court held that:

> we are not so ready . . . to assume the worst about those in the academic community. Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness.[21]

In sum, the Court "conclude[d] that the EEOC subpoena process does not infringe any First Amendment right enjoyed by [colleges or universities, and] the EEOC need not demonstrate any special justification to sustain the constitutionality of Title VII as applied to tenure peer review materials in general or to the subpoena involved in this case."[22]

THE IMPACT OF THE DECISION

The University of Pennsylvania decision is not the first time that the Supreme Court has rejected what it believed to be an "attenuated" or "speculative" claim of First Amendment privilege for confidential information. In Branzburg v. Hayes,[23] the Court squarely rejected a newspaper reporter's claim of First Amendment privilege for "confidential" information received from an informant.[24]

The Court, in language that would be echoed in the University of Pennsylvania decision almost 20 years later, stated in Branzburg that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[25] Moreover, the Court expressed skepticism that such an incidental burden actually would infringe the First Amendment rights of reporters:

> [it is] unclear how often and to what extent [a reporter's confidential informants] are actually deterred from furnishing information when newsmen are forced to testify before a grand jury.[26]

The decision in Branzburg -- like the subsequent decision in University of Pennsylvania -- rejected a claim of privilege for confidential information in circumstances where the Court believed that the burden imposed was indirect and incidental and the injury to First Amendment rights was speculative.

In the final analysis, the arguments pressed on behalf of academic freedom in University of Pennsylvania could not escape the shadow of Branzburg. The university and its counsel were aware of the problem of distinguishing Branzburg, and one of the central strategies of the litigation was to attempt to distinguish factually the need for confidentiality in peer review from the reporter's need to protect confidential informants. That strategy was carried out in the university's brief (through citation to affidavits and scholarly materials) and in the briefs of amici in support of the university.[27] However, the Supreme Court is constrained very little in its ability to engage in broad "legislative" fact-finding, particularly in constitutional cases. Once the court concluded -- as a matter of "fact" -- that the link between confidentiality and the functioning of the university tenure system was "remote" and "speculative," its decision, in light of Branzburg, was a foregone conclusion.[28]

This link between the Branzburg and University of Pennsylvania decisions is important for reasons other than legal doctrine or precedent. First, reading the University of Pennsylvania decision in light of this background makes it clear that the court's decision does not derive from any hostility to the academic tenure decisionmaking process or to the value of confidentiality in that process. In addition, the Court recognizes that the lessening of confidentiality has costs, and it by no means disparages the inherent value of confidentiality to the tenure review process. After all, the Supreme Court is an institution that conducts its deliberations and decisionmaking under a veil of secrecy; it would be ironic, to say the least, if the Court did not recognize the value of confidentiality in other settings.

ACADEMIC FREEDOM

The Court in University of Pennsylvania reaffirms the existence of a First Amendment-protected right of "academic freedom".[29] The Court explains that its "academic freedom" decisions serve to protect the content of academic speech from government interference.[30] Moreover, the Court suggests that the protections of the First Amendment in an academic setting extends both to the institution itself and "those [individuals] affiliated with it."[31] Thus, while the Court concludes that it "need not define today the precise contours of any academic-freedom right against governmental attempts to influence the content of academic speech through the selection of faculty or by other means," it certainly confirms that such a right exists.[32] In sum, the decision -- while certainly not a victory to either the University of Pennsylvania or other institutions of higher learning -- was not entirely a long-term loss for universities and their faculties.

Read in light of Branzburg and the history of claims of evidentiary privilege in federal court,[33] the scope and immediate impact of the University of Pennsylvania decision is fairly clear. The decision means that colleges and universities have no privilege to withhold confidential materials relating to the tenure process in all federal court actions (including administrative subpoenas that would be enforced in federal court). Although the case arose in the context of an EEOC subpoena, there is no reason that this principle would not apply to discovery in private Title VII actions where the plaintiff may obtain "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . "[34]

Moreover, the Court's ruling that there is no "general" common law privilege for such material under Federal Rule of Evidence 501 should apply to all "civil actions and proceedings" against a college or university in federal court.[35] Thus, as long as the material sought was relevant to a claim or defense, the institution would be required to produce it. The holding would, of course, apply to public as well as private institutions.

The broader implications of the "loss" of confidentiality in the peer review process are more difficult to predict. If you begin with the premise that ability to speak in absolute confidence promotes candor, then the opposite also must be true: the absence of confidentiality results in some loss of candor. The first question is whether the difference between a qualified privilege and no privilege will result in a significant shift in the number of disclosures of confidential peer review documents. The second question is whether the number of disclosures will affect the level of candor in academic peer evaluations. The ultimate effect of the decision is therefore difficult to measure because it requires certain behavioral predictions -- i.e., the degree to which the decision will undermine the candor and credibility of peer review evaluations depends on the degree to which the persons writing and receiving those evaluations perceive a loss of confidentiality and how they choose to act on that perception.

If the university had won, the qualified privilege still would require disclosure of confidential peer review materials whenever necessary to resolution of a claim of discrimination. Under the decision as it stands, peer review materials are available to anyone willing to exert the effort to put the administrative or judicial process in motion. If a disappointed faculty member files a claim with the EEOC, peer review materials must be disclosed to the EEOC.[36] Although the agency holds such materials in "confidence," its own regulations provide that the material may be disclosed to state and federal agencies, potential witnesses, and -- most important -- the party who filed the charge.[37] For practical purposes, that represents a total loss of confidentiality. Although the difference in the number of confidential documents that would be disclosed under the two positions is not quantifiable, it is not insubstantial.[38]

THE ISSUE OF CONFIDENTIALITY

With respect to the second, and more difficult question, Justice Blackmun expressed belief that the loss of confidentiality would not affect the candor of evaluations and recommendations: "Not all academics will hesitate to stand up and be counted when they evaluate their peers."[39] That may well be true, but it is also true that many, but not all, persons experience a reluctance, or hesitation, to be completely frank in criticism of a colleague's life work when that colleague will be the recipient -- or may be the recipient -- of the criticism. There is a tendency, not to mendacity, but to generality, moderation and the qualification of negative comments. To suggest that such conduct represents cowardice is unfair and, in any case, it begs the question.

Our social and legal system has long recognized the value of confidentiality in variety of ways, from secrecy in the grand jury room and the ballot box to the practice of not sharing letters of recommendation with the beneficiary of the letter. There is no reason to believe that the value of confidentiality is absent in this context. At bottom, despite the Supreme Court's reassuring words on the subject, we have to accept that a greater concern about the absence of confidentiality will, at least in some cases, result in a decrease in the candor of peer review evaluations. The *University of Pennsylvania* decision simply reflects a judgment that the value of confidentiality is outweighed, in these particular circumstances, by other more important and more pressing values.

A more thorough evaluation of the impact of the University of Pennsylvania case depends upon certain broad judgments about the day-to-day operation of the academic peer review process. Perhaps, the process would work better if it operated on an "open-file" system where it would be understood that the individual faculty member under consideration could, as a matter of course, review the contents of his or her tenure file. If so, the decision is of no importance. On the other hand, it is not difficult to imagine that increased "openness" would, in some cases, increase the "blandness" of written evaluations. If that happened, decisionmakers, who need as much information as possible to make these decisions, would be likely to place expanded reliance on informal, non-written evaluations.[40]

That would probably be unfortunate, but it would hardly amount to a crisis in higher education. At bottom, all that can be said is that the "importance" of the University of Pennsylvania decision depends on how highly you value or rely upon confidentiality in the peer review process. To the extent that many academic institutions had relied upon absolute confidentiality in the peer review process, the Supreme Court's decision in University of Pennsylvania is going to have a negative impact on that process in those colleges and universities.

Of course, even for academic institutions that do operate their peer review systems under promises of confidentiality, the University of Pennsylvania decision does not mean that confidential peer review materials are left completely unprotected in litigation. The Court itself noted the possibility that the district court could permit the university to redact certain information, such as the identity of the reviewer, from the materials.[41] The process of redaction might help in some cases, but in many cases, the author of the review will still be identifiable by writing style or, in a smaller institution or academic field, by a simple process of elimination. However, if the redaction, an expensive and time consuming process is done skillfully, it promises some protection for confidentiality.

In private (non-EEOC) litigation, academic institutions should seek, through litigation or negotiation, adequate protective orders to ensure that confidentiality is maintained to the greatest degree possible. For example, faculty members, either individually or as a whole, might be willing to consider waiving their right to seek review of their own tenure files. Such waivers could be obtained either through individual contracts or a broader collective bargaining contract. However, it is clear that such waivers would not be binding on the EEOC and there is at least some risk that such a waiver might not be upheld on public policy grounds.

Once private litigation is initiated, and tenure review files are sought, colleges and universities should, at the very least, seek an enforceable confidentiality agreement prior to producing the files.[42] Confidentiality agreements -- or court orders, if they cannot be negotiated -- are not uncommon in commerical litigation, where they are used to shield trade secrets, proprietary information or the privacy of personnel files. Generally, such agreements limit the copying, distribution and use of the confidential material and require that the material be returned when its use in the litigation is completed. Although this is not a perfect solution, experience demonstrates that it can be a relatively effective means of protecting confidentiality in private litigation.

In addition, the decision does not preclude efforts to protect such information from unnecessary disclosure in forums other than federal court. For example, state statutes that create a privilege for "confidential official communications"[43] would still be applicable in state court proceedings.[44] In private dispute resolution proceedings, such as arbitrations or grievance committees, the parties -- i.e., the institution and faculty member -- can and should define, by contract, the nature and scope of confidential material on which the dispute resolution will be based. Academic institutions should use individual contracts, collective bargaining agreements and internal review processes to channel disputes regarding tenure decisions into less formal resolution mechanisms.

Such alternative dispute mechanisms might take the form of neutral review committees, which might include faculty and administration representatives as well as representatives from outside the institution. In the alternative, more formal, adversarial mechanisms for arbitration or litigation can be adopted that would offer an alternative to the federal courts. In order to be effective, however, such alternative procedures have to offer both the institution and the aggrieved faculty member a sense that their side of the controversy has been fully aired and considered. Also, if such alternative procedures are merely advisory and not binding on the parties, then it is likely that they will not be viewed as satisfactory substitutes for litigation but will instead be another step on the way to court. Ultimately, the type of process that will work depends on the character of the institution and what the faculty and administration are willing to accept as a reasonable process.

Finally, it is well to recall that the Supreme Court simply held that nothing in the First Amendment to the Constitution or the Federal Rules of Evidence required that a qualified privilege must be recognized for confidential peer review materials. That does not mean that such a privilege (or something less formal than a privilege) could not be recognized by the EEOC as a matter of sound investigatory policy. The EEOC can and should be urged to adopt such a policy to protect confidential material from unnecessary disclosure. Such a policy need not be complicated nor need it interfere with the EEOC's legitimate investigatory goals.

For example, rather than requesting peer-review files as a matter of course in any claim involving denial of tenure, the EEOC could issue guidelines that would require the investigator to make a determination whether academic performance played any role in the decision to deny tenure prior to seeking such documents. If, in fact, the university rests the denial of tenure on teaching skills or violation of a university rule or policy, completely unrelated to scholarship, there is absolutely no reason for EEOC to require the university to violate its pledge of confidence with regard to peer-review analysis and comment on the candidates' scholarship. It is irrelevant in every sense of the word.

Such a guideline, or something similar, is readily within the authority of the EEOC to establish. It could be created, wth the participation of the academic community, through notice and comment rulemaking or by a more informal process such as a modification to the EEOC's Compliance Manual. The only alternative that does not seem reasonable or responsible is to do nothing.

In sum, the University of Pennsylvania decision constituted a loss on a discrete claim of "academic freedom," but the doctrine of academic freedom and its larger ramifications were not substantially disturbed. Even on the narrow question presented, the implications of the decision, while serious, are not disastrous. Moreover, there are a number of corrective responses that can offset any negative effects of the ruling, and we would urge the EEOC to seriously entertain one or more of the approaches outlined above.

ENDNOTES

[*] Rex E. Lee, Carter G. Phillips and Sharmon Priaulx provided invaluable assistance in the preparation of this paper.

1. 110 S.Ct. 577 (1990). Justice Blackmun authored the decision for a unanimous court.

2. The EEOC had sought such documents not only for the complaining faculty member but also for five other faculty members that it believed were "comparable" to complainant. In fact, four of the five "comparable" candidates were candidates for tenure from different departments.

The tendency of the EEOC to issue grossly overbroad subpoena requests had contributed to the concern for confidentiality in the university community. For example, in EEOC v. Franklin & Marshall College, 775 F.2d 110 (3rd Cir. 1985), a case involving a claim that the college had discriminated against a professor in the French Department based on his French national origin, the EEOC sought all tenure review documents from all candidates throughout the college from 1977 to the time of the investigation.

3. The quotation derives from Justice Frankfurter's seminal exposition of the scope of academic freedom in Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

4. Brief of Petitioner at 10, University of Pennsylvania v. EEOC, 110 S.Ct. 577 (1990) (No. 88-493).

5. Id.

6. Id. at 13-14.

7. Id. at 14.

8. Id.

9. 110 S.Ct. at 582.

10. Id. at 584.

11. Id. at 585.

12. The Court did not explain why it failed to "perceive" any difference between the unique status of the tenure system in academia and the employment of writers, publishers, musicians and lawyers outside of the academic setting. In fact, the unique historical and social role of academic tenure, which was set out in the briefs of the university and its supporters, would have provided ample ground to distinguish the university's claims from those of the other groups mentioned. This gap in the Court's decision is striking -- particularly in light of the fact that the Court defended he common law privilege for grand jury materials on the unique historical status of the grand jury. Id. ("the rule of secrecy dated back to the 17th Century").

13. Id. at 586 (emphasis in original).

14. Id. at 587.

15. Id. (emphasis in original).

16. Id.

17. Id.

18. It might be slightly ironic that the Court chose to illustrate this point by citation to Buckley v. Valeo, 424 U.S. 1 (1976), which invalidated substantial portions of the federal campaign finance laws on the ground that, in some cases, they interfered with contributors' First Amendment-protected rights to contribute money to candidates.

19. 110 S.Ct. at 588.

20. The Court made its own factual finding that "confidentiality is not the norm in all peer review systems." Id. (citing unpublished Ph.D. dissertation from the University of Maryland, which involved a survey limited to 123 liberal arts colleges).

21. Id.

22. Id. at 589.

23. 408 U.S. 665 (1972).

24. The Court characterized the claim as one that "under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was

necessary." 110 S.Ct. at 588.

25. 408 U.S. at 682.

26. 110 S.Ct. at 588 (quoting Branzburg, 408 U.S. at 693).

27. Both the American Association of University Professors and the American Council on Education filed very thoughtful briefs on this issue, presenting a balanced view of the interests in confidentiality and the practical effects of disclosure.

28. The University of Pennsylvania was placed in a very difficult position regarding this question of constitutional fact. Because the district court believed that a First Amendment argument was not a "proper" response to a subpoena enforcement action, the district court prevented the university from developing facts in support of its constitutional argument. Therefore, it is not surprising that the Supreme Court found the record in support of the university's case to be somewhat sparse. The Supreme Court also ignored the university's request that, if the court found the factual record inadequate to support the university's position, the court should remand to provide the university with an opportunity to develop the record.

29. 110 S.Ct. at 585-86.

30. Id. at 586.

31. Id.

32. Id. It is interesting that the opinion states that the Court "fortunately" will not have to divine the scope of academic freedom, presumably because the Court believes that would be a difficult task that is best left for another day. It also is, in my opinion, fortunate for colleges and universities (and for faculties and administrators) that their First Amendment rights continue to be reaffirmed in a form that remains deliberately vague. Precision certainly has its values, but claims of constitutional protection when not well-developed in the case law, are effective and flexible tools, subject to interpretation, negotiation and development in the most favorable factual settings.

33. Claims of privilege in federal court are governed by Federal Rule of Evidence 501 which provides that:

> Except as otherwise required [by the Constitution, federal statute or Supreme Court rule], the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Despite the fact that this Rule was intended to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis" (Trammel v. United States, 445 U.S. 40, 47 (1980)), the federal courts have been slow to recognize evidentiary privileges which are not already well-established at common law.

34. Fed. R. Civ. P. 26(b).

35. The Court's decision with respect to the University of Pennsylvania's "common law" claim was decided pursuant to the Federal Rules of Evidence, which apply in all "civil actions and proceedings" including contempt proceedings to enforce an agency subpoena. Fed. R. Evid. 1101(b). The "rule with respect to privileges applies at all stages of all actions, cases, and proceedings" in federal court. Fed. R. Evid. 1101(c).

36. If the EEOC does not seek the materials, a claimant may obtain them through federal court litigation.

37. See 29 C.F.R. §1601.22. The EEOC requires that persons to whom such confidential materials are disclosed must "agree" to hold such materials in confidence, but, in fact, there are no sanctions for violating such agreements and those agreements are not enforced.

38. For example, the EEOC's Annual Report for fiscal year 1985 discloses that, in that year, the agency received 41 claims of discrimination in tenure at public colleges and universities and 13 claims of discrimination in tenure at private colleges and universities.

39. 110 S.Ct. at 588.

40. David Riesman has suggested that "the experience of... academicians is that, when confidentiality cannot be guaranteed, letters lose all credibility. The advantage lies not with those previously discriminated against, but with those in the appropriate network who can have sponsors telephone on their behalf." Chronicle of Higher Education, Sept. 29, 1980, at 24.

41. 110 S.Ct. at 589 n. 9.

42. See Fed. R. Civ. P. 26(c) (providing for protective orders to limit disclosure of confidential information).

43. See, e.g., Cal. Evid. Code § 1040; Col. Code of Court Procedure §13-90-107(e); Minnesota Civil Code §595.02(e). Most of these statutes apply only to "official" or "public" communications and thus would be applicable only to a public university.

44. The privilege for confidential official communications was held to apply to peer review materials in a public university in McKillop v. Regents of the University of California, 386 F.Supp. 1270 (N.D. Cal. 1975).

LEGAL ISSUES OF THE 90's

C. ANTI-DISCRIMINATION LAW AND ACADEMIC FREEDOM AFTER UNIVERSITY OF PENNSYLVANIA v. EEOC

◆

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BACKGROUND

When Rosalie Tung filed a charge alleging she had been discriminatorily denied tenure by the University of Pennsylvania, the EEOC began its investigation with a request for information it thought relevent to evaluating the merits of the charge. The documents sought included Tung's tenure-review file and the tenure files of five male comparators whom she viewed as having been awarded tenure with lesser qualifications than her own. The university refused to comply with this request. Rather, it informed the Commission that academic freedom protected "confidential peer review information" from disclosure and urged the EEOC to use "all feasible methods to minimize the intrusive effects of its investigations."[1] The Commision refused, saying that its investigation would be impaired. This dispute went to the courts, ultimately ending up in the Supreme Court.

In a unanimous decision written by Justice Blackmun, the Court held that no common law or First Amendment privilege permitted the university to refuse disclosure of the requested tenure files. As to the common law privilege claim, the Court found that it lacked an historical basis and that Congress had established no academic freedom privilege when it extended Title VII to colleges and universities in 1972. Justice Blackmun succinctly noted that "[i]f [Congress] dislikes the result, it, of course, may revise the statute."[2] On the First Amendment claim, the Court was equally forceful. It held that the university's claim did not fit within any right of academic freedom established by prior cases and refused to erect a First Amendment barrier to the EEOC's statutorily-mandated investigation.

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THE COURT'S REASONING

Two components of the Court's reasoning merit special mention. First, the Court found the university's claim "remote and attenuated."[3] It viewed the university as arguing:

> that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this, in turn, is central to the tenure process, which, in turn, is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach.[4]

I have taught in a university for more than a decade and have sat on numerous tenure-review committees. And I believe Justice Blackmun's statement that the university's claim is "remote and attenuated" is accurate. Tenure is highly sought, it provides enormous job security, and while it sometimes shelters incompetence, it also fosters academic freedom. It is a traditional and appropriate way of furthering institutional choices as to who will teach. But, I do not believe it is the only, nor necessarily the best, way of retaining and nurturing outstanding faculty performance. Universities may attract and award scholars with offers of higher pay, research assistance and facilities, established grants, and endowed chairs, as well as the guarantee of tenure.

Second, the Court found the injury to academic freedom to be "speculative."[5] The EEOC pointed out that some tenure review processes do not mandate confidentiality, and that the University of Pennsylvania's "special necessity" test would have led to some disclosure.[6] Will the Court's decision drive tenure discussions "underground" and permit unstated, but discriminatory, factors to expand in such processes? I doubt it. Importantly, tenure decisions spur vigorous debates concerning institutional aspirations and individual performance expectations. The need for such debates is so compelling and the alternatives to open discussion are so unattractive that I doubt the possibility of a charge and investigation for discrimination will have any serious impact upon tenure processes. I believe the Court's observations that "not all academics will hesitate to stand up and be counted when they evaluate their peers" will prove to be an understatement. University professors are sufficiently confident, I believe, that they will continue to criticize the work of junior faculty without regard to race, sex, national origin, or the possibility of an EEOC investigation.

THE QUESTION OF REDACTION

The Supreme Court explicitly left one important issue open. In footnote 9, the Court noted that it was not considering "whether the District Court's enforcement of the Commission's subpoena will allow petitioner to redact information from the contested materials before disclosing them." I would like to explore with you this issue of redaction.

The Commission has broad authority to seek any evidence relevant and necessary to the resolution of any issue in an investigation of a discrimination charge. Courts must enforce Commission subpoenas when the material requested is relevant to a valid charge and the demand for information is not too indefinite and has not been made for an illegitimate purpose.[7] In no case, does the Commission permit the respondent to edit the materials it seeks during investigation of a charge. The absence of a special constitutional or common law privilege against disclosure of confidential tenure review materials to the EEOC means that universities are on an equal footing with other employers and that tenure decisions must be scrutinized to the same degree as any other employment decision by any other type of employer. There is no basis in law for any claimed right of universities to redact the materials before submitting them to the Commission. As the Supreme Court noted in University of Pennsylvania, "[c]learly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation."[8] If the Commission is to fulfill its investigative function, it is essential that there be a strong presumption against the propriety of allowing an alleged discriminator to pick and choose the information it will supply in response to a valid subpoena.

The Commission's prior experience with files redacted by university employers highlights the impediment such a practice creates to enforcement of anti-discrimination statutes. While redaction was permitted by the Seventh Circuit in the University of Notre Dame case, this result was mandated by the court's now invalid recognition of a qualified privilege against disclosure of names and identities of persons participating in the peer review process.[9] Although the Seventh Circuit left the Commission with the option of making a showing of particularized need for further disclosure after its review of the redacted files, this solution created precisely the "litigation-producing obstacle" to the Commission's effort to investigate and remedy alleged discrimination that the Court decried in University of Pennsylvania.

The Commission agreed to accept redacted materials in the Franklin and Marshall case,[10] and its experience demonstrates that permitting the deletion of all identifying information from tenure review files makes the documents virtually useless for evaluation of whether discrimination has occurred. With little to go on but a stream of adjectives describing unspecified work habits or products, the EEOC cannot make a determination of whether discrimination played some part in the decision to deny tenure to a particular candidate.

CONCLUSION

Universities claim that unless they can protect the confidentiality of the peer review process, academic freedom will be undermined. We believe that these fears are greatly exaggerated and that universities have little to fear from disclosure of confidential tenure review files to the EEOC. Title VII itself prohibits disclosure by commission employees of any evidence obtained through charge investigations upon pain of criminal penalties.[11] While investigative files may be revealed to a charging party,[12] Commission policy mandates removal of confidential material from the files, including "[a]ny informatiion concerning the identifies of and statements by witnesses who have elected to provide confidential statements."[13] This provision could be expansively read to authorize the Commission to perform redactions the Commission deems appropriate, after reviewing the complete files to make a reasonable cause determination. Finally, the Commission, like all government agencies, is constrained by the requirements of the Privacy Act and the Freedom of Information Act from making unwarranted disclosure of sensitive or confidential information.[14] The Commission is experienced in responding to FOIA requests and is sensitive to the constraints imposed by the statute's various exemptions. Employers who routinely disclose confidential data in compliance with federal reporting requirements are protected from disclosure by the trade secrets and confidential commercial data exemption of the FOIA, and the Commission has consistently honored the congressionally mandated balance between competing interests in privacy and open disclosure.

ENDNOTES

[*] The views expressed herein are those of the author and not those of the EEOC.

1. University of Pennsylvania v. EEOC, 110 S.Ct. 577, 580 (1990).

2. Id. at 585.

3. Id. at 588.

4. Id. at 587-88.

5. Id. at 588.

6. Id.

7. EEOC v. Shell Oil Co., 466 U.S. 54 (1984).

8. 110 S. Ct. at 584 (quoting EEOC v. Franklin and Marshall College, 775 F.2d 110, 116 (3rd Cir. 1985).

9. EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983).

10. EEOC v. Franklin and Marshall College, 775 F.2d 110, 117 (3rd Cir. 1985).

11. 42 U.S.C. § 2000e-8(e).

12. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 598-604 (1981).

13. EEOC Compliance Manual § 83.6(b).

14. *See*, *e.g.*, *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378 (D.C. Cir.), *cert. denied*, 434 U.S. 826 (1977); *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

LEGAL ISSUES OF THE 90's

D. KEEPING ACADEMICS OUT OF COURT: JUDICIAL RESPONSES TO FACULTY LITIGATION AND HOW TO AVOID IT

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Since 1972, when the federal Civil Rights Act of 1964 was amended to forbid discrimination by institutions of higher education, over 350 lawsuits filed under this law by college faculty claiming discrimination have been decided. Many more have been initiated, but have either been settled or withdrawn. Similar claims have been litigated in state courts as well. These claims range from career-determining issues such as tenure or hiring to less critical matters such as salary rates, promotions not involving tenure, or administrative assignments. Whether or not these lawsuits are litigated to their conclusion or terminated at some point short of a judge's or jury's decision, an institution and its faculty involved in litigation bear heavy costs, both in terms of money and in other ways, such as morale and image problems.

LITIGATION TRENDS

When George LaNoue and I began the research for our book Academics in Court (1987), there was a perception of substantial litigation activity by faculty, but little documentation and virtually no analysis. Our primary interest was the effect of all this litigation on the people and institutions involved--on both sides of the lawsuit. To that end, we talked with plaintiffs and defendants, lawyers for each side, judges (where we could), and especially to faculty and administrators on the receiving end of the lawsuit. But, being curious, we could not help but wonder how successful all this litigation was for plaintiffs and what the outcome was for the colleges they were presumably beating.

After reading all cases culminating in a published court opinion that were litigated in federal court between 1970 and 1984 under any federal civil rights law, we discovered some surprising facts. White women suing as individuals were plaintiffs the most frequently, but their win rate was only about 20 percent. When classes of women faculty sued, their success rate increased to about 42 percent. White women suing black institutions won 4 out of 4 times, while racial minorities, both male and female, were singularly unsuccessful in their discrimination claims. Data for 1985 and 1986, compiled by Schoenfeld and Zirkel on sex discrimination cases only (1989), also show a 20 percent success rate for plaintiffs. Given these dismal statistics, why have plaintiffs continued to pursue discrimination lawsuits?

Our research showed that faculty sue their institutions for several reasons. Probably the most frequently cited reason is a conviction that discrimination must have been the cause for the negative decision because nothing negative had ever been communicated to that faculty member. In the absence of some criticism of the faculty member's performance that had been communicated to the faculty member one or more times in the past, the faculty member simply did not believe that the reason for the negative decision was due to deficiencies in his or her performance.

A second reason for litigation frequently cited was procedural violations so substantial that the plaintiff believed they prejudiced the decision. This type of litigation was less frequent for those institutions with either a faculty union or a workable grievance system.

A third reason was obvious disparities, especially in salaries, in the treatment of male and female faculty. Such disparaties have spawned both comparable worth litigation (to date unsuccessful) as well as institution or even system-wide sex discrimination claims, some of which have been successful.[1] Although judges tend to accept market arguments to justify salary differences by discipline, such arguments are less successful when the salary disparity occurs within disciplines. Clear differences in the way a female physical education professor was treated by the administration in comparison with her male colleagues led to one of the rare victories for a plaintiff, Connie Kunda, who was reinstated to the faculty of Muhlenberg College and granted "conditional tenure" by the judge.[2]

Faculty continue to sue their institutions, despite the research findings that these lawsuits are usually doomed. And some faculty have won recently in lawsuits that are at least symbolically important. Professor Gutzwiller prevailed in her litigation against the University of Cincinati, although it took a federal appellate court opinion, and many years of litigation to vindicate her (Gutzwiller v. Fenik, 1989). Professor Brown's claim of discrimination by Boston University was upheld by another federal appellate court which took the historic step of awarding her tenure (Brown v. Boston University, 1989). The University of Minnesota recently settled a six-year old salary discrimination case, agreeing to pay $3 million in back pay to its 1,400 female professors, administrators, and academic staff members (PSEW, 1990). All of these victories received wide publicity, while a victory for an institution, if noted at all, is usually given scant attention by the press.

A recent decision by the U.S. Supreme Court in a case called EEOC v. University of Pennsylvania may encourage more faculty to file discrimination claims because they will have an easier time gaining access to formerly confidential outside letters, minutes of peer committee deliberations, and other information which may reveal potential discrimination. Although more claims may be filed, the number of lawsuits litigated to their conclusion may actually decline, particularly in those cases where the letters are critical of the faculty member's performance or at least show no overt evidence of impermissible bias.

The rate of litigation seems unabated despite the poor odds faced by plaintiffs. Understanding the standards that judges apply to these cases should help faculty and administrators tailor their decision-making practices to meet those standards; after analyzing these standards, the paper makes several suggestions for institutional practice that should help avoid litigation.

STANDARDS OF JUDICIAL REVIEW

In the nearly twenty years that faculty discrimination claims have been litigated, certain standards have emerged that most judges follow. Although the civil rights laws make no special provisions for the discrimination claims of faculty, it has become evident that judges use different standards for evaluating discrimination claims against colleges and universities than they do claims against other kinds of organizations. Not only do plaintiffs, like other professionals, face greater judicial skepticism when they challenge "management" decisions (Bartholet, 1982; Waintroob, 1979-80), but they also suffer from the deference accorded by most judges to the judgments of peers or academic administrators (Hobbs, 1981; Lee, 1985).

Judges examine the procedure used to make academic employment decisions. Particularly, in those cases where a series of individuals or groups is involved, such as in promotion or tenure decisions at research-oriented institutions, judges generally have ruled that a system that has checks and balances is fair (Lee, 1982-3).

Judges then look at whether procedural violations have occurred and, if so, to what degree they prejudiced the faculty member. De minimus violations generally will be insufficient to convince a judge to overturn the institution's decision, but major procedural violations have, on occasion, convinced a judge that discrimination occurred.

The level at which the effective negative decision was made is also significant. If a faculty peer review committee made the negative recommendation and top administration concurred, it will be most difficult for a plaintiff to convince a judge to overturn that peer judgment (Zahorik v. Cornell University, 1984; Lieberman v. Gant, 1980). On the other hand, if the faculty member's peers voted favorably on a faculty candidate and the administration ignored that recommendation, it is slightly easier for a plaintiff to win

(Kunda v. Muhlenberg College, 1980; Brown v. Boston University, 1989).

Unless a plaintiff has a "smoking gun" such as a letter from a department chair stating that the department will not hire a woman faculty member (Rajender v. University of Minnesota, 1979), it has been most difficult for plaintiffs to convince a judge that a decision by disciplinary peers, both within and outside the institution, that the candidate's performance does not merit promotion or tenure (or hiring or a salary increase) is discriminatory. What is meant by "qualified" in the nonacademic sector, generally an assessment of whether the individual's performance has been acceptable, does not translate to academic discrimination cases. One appellate judge wrote:

> [there is a] difference between the selection of a craftsman and of a professional. A bricklayer who can properly lay a specified number of bricks in a specified period is ordinarily as good as any other bricklayer likely to appear. But in the selection of a professor. . . while there may be appropriate minimum standards, the selector has a right to seek distinction beyond the minimum indispensable qualities. (Kumar v. Board of Trustees, 1985, p. 11)

Courts have conceded that Title VII cases pose difficult problems for judicial review, both because of judges' general lack of knowledge about what makes a "good" chemistry or history or psychology professor, and because of the special significance of a tenure decision, which effectively confers lifetime job security. An appellate judge noted the complexity of attempting to discern whether the criteria used by Cornell University were appropriate for a tenure decision and whether they were fairly applied:

> [The] criteria, however difficult to apply and however much disagreement they generate in particular cases, are job related. . . It would be a most radical interpretation of Title VII for a court to enjoin the use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review. (Zahorik v. Cornell University, 1984, p. 96)

Thus, a plaintiff must show unanimous or nearly unanimous support by disciplinary peers, or strong evidence of bias on their part, before a judge will entertain a claim that the negative decision was based upon discrimination.

Two recent trends in judicial analysis of academic Title VII cases have made it more difficult for plaintiffs, both individual and class, to win these lawsuits. The first trend is for judges to deprecate plaintiffs' attempts to introduce evidence of the low tenure rates of women throughout a college or university, or to provide evidence of other alleged discrimination against women faculty. In several opinions during the past decade, judges have refused to consider such evidence as probative of discrimination against a particular plaintiff. The reasoning has been this: If the effective review of a plaintiff is conducted by the department, then the department is really the "employer" for purposes of Title VII analysis, and higher organizational levels merely ratify the decision or reverse it on procedural, rather than substantive grounds. This analytical approach was used in cases against Harvard, Cornell, the University of Delaware, and the University of Cincinnati.[4] Making the department the only unit of analysis in a discrimination lawsuit weakens the evidentiary case of some plaintiffs, especially those from small departments where employment decisions are infrequent and, perhaps, the plaintiff's decision was the only one in many years. In order to prove discrimination, a plaintiff must show different, and less favorable, treatment by the college. If there is no one with whom the plaintiff may be compared, it is extremely difficult to prove that the unfavorable treatment was for discriminatory reasons.

Another developing trend is for judges to dismiss a Title VII case before trial is over in situations where the plaintiff cannot demonstrate that someone viewed his or her work positively. For example, in Zahorik v. Cornell University (1984), the court made it clear that only because a few of the plaintiff's outside letters were positive would he permit the case to be tried to its conclusion. Judges apparently do not believe that everyone involved in a particular promotion or tenure decision could have acted with discriminatory intent.

Despite all the barriers to plaintiffs described above, they continue to file discrimination lawsuits against colleges and universities. Aside from the obvious legal problem posed by a discrimination lawsuit, such litigation damages faculty morale, both among the plaintiff's supporters and particularly among those faculty and administrators who are accused of bias. And certainly, an employment decision that is perceived as unfair, whether in fact it is or not, is a morale problem for the institution. Furthermore, the serious career consequences of a negative tenure decision raise the stakes in such decisions and make litigation a salient option for a faculty member with few other options. The potential fallout from an academic employment decision highlights the importance of policies and practices that are not only fair and reasonable, but which are perceived to be so.

BUILDING A PROCESS THAT REDUCES LITIGATION

No decision-making process, however rational and fair, can absolutely prevent all lawsuits. Individuals who believe themselves wronged, or who see a psychological or financial advantage in filing a lawsuit, hoping for the institution to make some concession, will file lawsuits despite any institution's best efforts to prevent them. But building and using a decision-making system that is demonstrably fair, and monitoring the decisions made to ensure that they are faithful to the process, should make such lawsuits easy to win and should, in fact, discourage frivolous litigation.[5]

A. Clear Performance Expectations

The most fundamental element of a fair employment decision-making system is the clear and frequent communication of performance standards to all faculty, but most particularly to nontenured faculty. This process should begin before a faculty member is hired, and should continue throughout the probationary period, at the time of renewal, tenure, and promotion decisions, and throughout the faculty member's career.

At institutions with well managed employment decision-making systems, performance standards are set at the department level by department faculty within parameters established by the institution. Clearly, the college has the right to insist that performance standards match the institution's mission and special needs, but the way those factors are interpreted by discipline is the province of that discipline's faculty. Performance standards should be established at a time separate from the consideration of any particular faculty member for hiring, promotion or tenure in order that the development of standards not be influenced by concerns (either positive or negative) over a particular employment decision. Although it may be difficult to determine with precision what level of teaching performance is expected or how many publications a faculty member is expected to produce (if any), the performance standards should be as specific as possible, both because they are more useful as guides to faculty and because they are easier to apply. For example, the department should identify the journals that are considered important for faculty to publish in--debates about which journals "count" and how much they "count" for should not occur for the first time during a promotion or tenure decision. What type of research is considered appropriate for department faculty (for example, basic versus applied, quantitative versus qualitative methodologies) should also be settled long before these standards are applied to a faculty colleague. And, of course, these standards are useful when evaluating the performance of tenured faculty as well as those who must stand for tenure.

B. Regular Feedback and Mentoring

In reviewing the cases where faculty sued their institutions when they were denied promotion or tenure, we were surprised to learn that, in many cases, faculty had never been evaluated until the tenure decision was made (normally six years after hiring, but later in some cases). In other cases, faculty had been told informally, generally by the department head, that they were "doing fine", so the negative decision was an unhappy surprise. One plaintiff told us, "If I had known what my colleagues really thought of my work, I would have left the institution and would never have put myself through that tenure decision. Because they never expressed dissatisfaction with my work, I did not believe that my performance was the reason I was denied tenure--I thought it must be my gender."

Regular feedback to faculty, especially untenured faculty, on their performance is important for several reasons. First, it can help relatively inexperienced teachers and scholars improve their work early in their careers so that they can avoid a negative decision that can truncate an academic career. Secondly, it advises faculty members of the department's (or at least the chair's) views of their progress toward tenure or promotion, avoiding a surprise when the decision is announced. And thirdly, in cases where institutions can document the fact that a plaintiff has received regular feedback and opportunities to improve his or her performance, a judge is much less likely to find that discrimination occurred (Johnson v. University of Pittsburgh, 1977). Most ethical plaintiffs' attorneys would not advise a faculty member to sue if there were evidence of regular criticisms of a faculty member's performance.

Mentoring untenured faculty is another strategy to increase the success of junior faculty and to avoid litigation over a negative decision. As long as the mentor is competent and conscientious in working with the faculty member, the result of mentoring should be either a successful promotion or tenure candidate, or a well-documented account of attempts to work with a faculty member that did not succeed.

C. Fair Personnel Decisions

In developing a litigation strategy, attorneys know that what is important is the perceptions they can create in the mind of a judge or jury because these perceptions will guide the decision. Similarly, any personnel decision must be perceived as fair by the candidate; it is not enough that the process was fair, whether or not the candidate believes it to be. Perceptions of unfair treatment or bias are the impetus for a lawsuit.

In order to be perceived as fair, the decision-making process should involve the candidate to the extent practicable, should conform to all policies and procedures, and should provide rebuttal or appeal opportunities. The opportunity to challenge a negative personnel decision within a college or university very likely reduces litigation, and plaintiffs have generally been unsuccessful when challenging decisions at institutions with fair appeal procedures (Lieberman v. Gant, 1980).

D. Involvement of the candidate

One frequent complaint of plaintiffs is that the individual preparing the candidate's dossier omitted significant information or mischaracterized some of the plaintiff's work (Smith v. University of North Carolina, 1980). If a candidate is asked to prepare his or her own dossier, this problem is easily avoided. The candidate is certainly the best informed as to what he or she has done. The department chair should assist the candidate and make sure that material included is relevant and accurately portrayed (for example, that a "work in progress" is really in progress and not just an idea in the candidate's mind). Placing the responsibility for dossier preparation on the candidate will eliminate any possible suspicions that the dossier is incomplete or inaccurate.

If letters from external experts are solicited, the candidate should be permitted to suggest some, but not all of the individuals from whom letters are requested. And some of the letters used in the decision should be from among the candidate's suggestions. Decision-makers are entitled to weigh letters from some experts more heavily than others; this is an academic judgment to which a judge would usually defer. Involving the candidate in recommending outside reviewers should increase the candidate's trust in the integrity of the process and the good faith of the decision-makers.

E. Conforming to procedures

Promotion and tenure decisions are difficult to make and often elicit strong emotions. In the heat of discussion and debate, procedural niceties may seem unimportant. Yet, both candidates and judges set great store by procedures. Legally speaking, they are a contract that guarantees protections. At unionized institutions, a procedural violation will generally result in a remand to repeat the decision-making process without violating the procedure. In terms of perceptions, procedural violations, whether innocent or careless rather than malicious, can give the appearance of wrongdoing and cast doubt on the good faith of the decision-makers. While procedural compliance cannot guarantee freedom from a lawsuit, procedural violations virtually do guarantee either a grievance or litigation.

F. Rebuttal and appeal procedures

At some institutions, a candidate is informed of the recommendation at each level of the process and has the opportunity to rebut that recommendation. Sometimes the rebuttal is in the form of a hearing before the individual or group who made the negative recommendation; at other institutions it is in writing. Nevertheless, it gives the candidate an opportunity to correct mistakes or misconceptions by the decision-maker and forces reconsiderations of the recommendation. This does not mean that the recommendation has to be reversed. In most cases, it will not be, but if a mistake was made, all parties are better served if it is corrected immediately rather than five years later after an expensive lawsuit. Certainly, the opportunity to rebut a recommendation increases the perceived fairness of the process and should reduce litigation.

Most institutions have appeals processes for promotion and tenure decisions; the proportion is probably very high in unionized institutions. But, the appeals process has to be perceived as fair by its potential users or it is useless. Particularly, if a charge of bias is made, remanding the decision to the same group that is accused of the bias will probably not be perceived as fair. On the other hand, it is unfair to a group of peers to take the decision away from them if an unfounded or frivolous charge of bias is made. The appeals procedure should provide for an analysis of whether there is enough evidence to suggest that bias could have occurred; if so, the procedure should provide for an alternate group to reconsider the decision.

Each of the above strategies--involving the candidate, procedural compliance, and an effective appeals procedure--should be designed both to improve the accuracy and fairness of personnel decisions and to ensure that these decisions are perceived as fair. The civil rights laws only protect candidates who are treated unfairly because of some characteristic such as race or sex; they do not permit judges to overturn decisions simply because a candidate disagrees with them. Perceived fair and equitable treatment should go a long way to dissuade faculty from challenging a negative employment decision in court.

FINAL THOUGHTS

Academic leaders, both faculty and administrators, face a difficult challenge in the 1990s. The demographics of our faculty will change as our faculty corps is first predominantly older and then, with the large number of retirements predicted for the mid-1990s (Bowen and Sosa, 1989), more heavily junior. The rush to hire and the subsequent personnel decisions that will be made for an increased number of new faculty suggest the potential for increased litigation if, in our rush to staff our colleges and universities, we do a careless job of making these decisions. Although, in truth, there may be nothing that will prevent a determined litigator from filing suit, careful planning, conscientious application of policies, and meaningful internal remedies will go a long way toward keeping academics out of court.

ENDNOTES

1. See Melani v. Board of Higher Education (1983) and PSEW, 1990.

2. The judge ordered that, if Connie Kunda completed her master's degree within two years, that the college award her tenure. This was called an award of "conditional tenure".

3. In cases filed under Title VII of the Civil Rights Act of 1964, all cases are tried before a judge who decides the case. Under some state civil rights laws, a jury hears discrimination cases; in other states, the state civil rights law is similar to Title VII's exclusion of juries from these cases.

4. See Jackson v. Harvard University (1989), Zahorik v. Cornell University (1984), Scott v. University of Delaware (1979), and Rosenberg v. University of Cincinnati (1986).

5. Portions of this section of the paper were adapted from Lee, 1989.

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LEGAL ISSUES OF THE 90's

E. CAMPUS BARGAINING AND THE LAW: THE ANNUAL UPDATE

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I. UNITED STATES SUPREME COURT RULINGS

The most significant cases decided in the employment field over the past year were issued last summer by the U.S. Supreme Court. Several decisions centering on various aspects of discrimination law provided considerable controversy and significant guidance for future parties to such suits.

One of the most significant cases decided last term, and perhaps the only case to fall on the plaintiff's side of the ledger, was Price Waterhouse v. Hopkins, 57 U.S.L.W. 4469 (1989). This case is significant because it deals with the important question of which side has the burden of proof in those situations where an employment decision was motivated by both legitimate as well as discriminatory motives. The facts of Price Waterhouse are particularly important for understanding the Court's decision. Price Waterhouse is a major accounting firm which had 662 partners in 90 offices when the litigation began. In 1982, the plaintiff Ann Hopkins was proposed for partnership. She was the only woman among the 88 candidates that year. During the selection process for partnership, any partner could submit comments about an individual's candidacy; an admissions committee made a recommendation and a policy review committee would then make the final decision. Ms. Hopkins apparently presented a difficult case for the firm. On the one hand, she had been a very successful senior manager and had played a pivotal role in securing a multi-million dollar contract wth the Department of State. Out of the 88 candidates for partnership that year, she had the best record in terms of obtaining major contracts for the firm. She worked hard and received praise from clients for her work.

On the other hand, some of the firm's partners reported aggressive, unduly harsh, difficult to work with, profane and impatient with staff. Eight of the 32 partners who submitted written evaluations recommended she be denied partnership; eight others claimed they had an insufficient basis for making a decision and three others recommended putting her candidacy on hold. Based on these numbers, the firm decided to put the decision on hold for at least a year. However, shortly thereafter, two partners in her local office decided not to support her candidacy which effectively blocked her partnership for the future. Hopkins then resigned and charged the firm with sex discrimination.

If the firm's denial had been purely based on the stated negative characteristics of her personality, Ms. Hopkins would have had a more difficult case in trying to prove sex discrimination. After all, the lack of such interpersonal skills is a serious shortcoming in a candidate for partnership and would be a legitimate criterion for consideration. However, the record showed that sprinkled among the partners' comments were ominous signs of a more suspect motivation. Several of the evaluations, for example, specifically referred to Ms. Hopkins' gender. These comments included:

- "She may have overcompensated for being a woman."
- "She needs to take a course in charm school."
- "Ann has clearly a difficult personality ... but many male partners are worse than Ann (language and tough personality)." This same partner felt some of the negative reaction was simply based on the fact that "it's a lady using foul language".
- Ms. Hopkins should be advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry".

Apparently, such comments were not unusual for the firm and some prior partnership decisions had also been infected by sex stereotyping.

As the case worked its way up through the judicial appeals route, the main clash was over the question of burden of proof. Price Waterhouse argued that it should not be found guilty of violating Title VII unless the plaintiff can prove that discrimination was a "but for" cause; in other words, the plaintiff must prove that she would have been made a partner but for the fact that she was a woman. On the other end of the spectrum, Ms. Hopkins argued that she should prevail as long as she can show that sex discrimination played some part in the decision.

The Supreme Court ruled, however, that the truth lay "somewhere between" these two points of view. The Court first rejected the employer's "but for" test, holding instead that "gender must be irrelevant to employment decisions" and that the critical inquiry is "whether gender was a factor in the employment decision at the moment it was made". On the other hand, the preservation of the employer's prerogatives requires that an employer not be held liable "if it can prove that, even if it had not taken gender into account, it would have come to the same decision". The principles taken together, then, require that:

> Once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.

For an employer, this meant that, for the first time, it may have to carry a burden of proof in a Title VII case. This is in sharp contrast to the traditional allocation of the burden of proof set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) which requires that the plaintiff first present a *prima facie* case that gives rise to an inference of discrimination. The employer is then required to rebut the inference by articulating some legitimate nondiscriminatory reason for its action. The employer does not have to prove that its decision was motivated by this reason but instead need only state it. Then, the plaintiff has the final burden to prove by the preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons but were a pretext for discrimination. Burdine, then, always placed the full and ultimate burden of persuasion upon the plaintiff.

Price Waterhouse did not, in any way, overrule Burdine but the Court in Price Waterhouse said that there will be selected cases where the employer, not the employee, must carry a burden of proof. These cases are the mixed motive cases. These are cases where it is not a question of whether the decision was based on either a legitimate or an illegitimate set of considerations. Instead mixed motive cases are those which admittedly involve both kinds of motivations. In the view of Justice O'Connor, in her concurring opinion, the Price Waterhouse analysis should only be used when there is direct evidence of intentional discrimination in the record. How much direct evidence is needed is an open question, and indeed, while four justices seemed to suggest that a decisional process tainted in any way by impermissible motives violates the Act, Justice O'Connor stated that evidence such as "stray remarks in the workplace" standing alone would be impermissible to shift the burden to the employer. In her view, only direct evidence that "an illegitimate criterion was a substantial factor in the decision" was sufficient to shift the burden to the employer.

What Price Waterhouse has done is allow plaintifs to argue that many cases, which previously would have been analyzed under the more difficult Burdine construct, should instead be viewed as mixed motive cases under which the employer must come to trial prepared to carry a significant burden of proof. To do this, plaintiffs need direct evidence of unlawful intent. The difference for the employer is significant because it is one thing to merely state and set forth a particular nondiscrimination claim for your action. It is quite another to have to carry the burden of proving that your employment decision was actually driven by that nondiscriminatory reason. In a close case, the advantage will rest with whatever side does not have the affirmative burden of proving its case.

Price Waterhouse is particularly relevant to colleges and universities. Justice O'Connor, in discussing the subtleties of decision-making in Price Waterhouse noted that, "in the context of the professional world . . . . decisions are often made by collegial bodies on the basis of largely subjective criteria". Clearly, she could have just as easily been referring to a tenure or promotion decision in a college or university. Certainly, in sex or race discrimination cases involving a denial of tenure, a college may always be subject to attack based on the discriminatory comments of a particular faculty member or two. But whereas in the past, such evidence was only used by the plaintiff to try to attack as pretextual the college's stated legitimate reason for the denial, such comments can now be used to show that the college's motivation for denying tenure was truly mixed -- thus giving rise to a burden on the part of the college to prove that it denied tenure for unlawful reasons and would have made that decision even if the discriminatory comments had never been made.

In Wards Cove Packing Co. v. Atonio, 57 U.S.L.W. 4583 (1989), the Supreme Court held that in a disparate impact case, a simple statistical comparison between minority representation in upper and lower level jobs in an organization will not in and of itself make out a prima facie case of disparate impact discrimination. The specific personnel practice that is challenged must be specifically identified and shown to be causally related to the disparate impact of which the complaint was made. Finally, in its most significant holding, the Court ruled that the plaintiff bears the burden of proof at all stages of a disparate impact case.

This case involved the salmon industry in Alaska. A substantial proportion of the jobs in a particular cannery operation was filled with minorities while a significantly lower proportion of the better non-cannery jobs was filled by minorities. The Court first noted that this statistical disparity, in and of itself proved nothing. The proper comparison must be between the racial composition of qualified applicants and of the incumbents in the relevant jobs. This part of the decision while highlighted in the reporting services, was not a major change from existing law.

The Court also continued the reasoning of the 1988 decision in Watson v. Ft. Worth Bank & Trust, 108 S.Ct. 2777 which first held that subjective employment practices (in contrast to objective testing or educational criteria) may also be challenged under a disparate impact theory.

However, the Court stated in Wards Cove that evidence of the cumulative effect of a number of employment practices is not enough to establish disparate impact. Instead, the specific practice which is alleged to be causing the disparate impact, such as word of mouth referral or applicant interviews, must be isolated by the plaintiff and its effect shown. For example, a bottom line racial imbalance in the workforce is insufficient to make out a case of disparate impact. Instead, the plaintiff must causally prove that each challenged practice has had a significant disparate impact on the employment opportunities for minorities. This holding makes the plaintiff's job in litigation much more difficult.

However, the greatest burden imposed on the plaintiffs in Wards Cove was the Court's holding that the burden of proof never shifts to the defendant at any point. Under earlier rulings, beginning with Griggs v. Duke Power Co., 401 U.S. 424 (1971), once the plaintiff did establish an adverse impact, the burden of proof shifted to the employer to show that the practice in question was a business necessity. Under Wards Cove, the employer's burden is merely to produce evidence of a legitimate business justification for the challenged employment practice. While an unsubstantial justification might not be enough, the challenged practice need not be "essential" or "indispensable" to the employer's business for it to satisfy the employer's burden of production.

Many plaintiffs claiming racial discrimination have successfully pursued litigation under 42 U.S.C., §1981, a post-Civil War Civil Rights statute guaranteeing blacks the same rights to make and enforce contracts as whites have. This statute was, in some ways, a more preferable avenue for plaintiffs because unlike Title VII, it provided for compensatory and punitive damages as well as a jury trial. In Patterson v. McLean Credit Union, U.S. ___, 109 S.Ct. 2363 (1989), the Supreme Court first reaffirmed its 1976 case of Runyon v. McCrory, 427 U.S. 160 that held § 1981 to be applicable to private employment. But the Court held that only the specifically stated right to "make a contract and to enforce it" would be actionable. Lawsuits about terms and conditions of employment or about termination of employment were held not subject to §1981 jurisdiction.

In the college setting, §1981 may still have considerable viability for plaintiffs even after the Patterson limitation. The Court ruled in Patterson that decisions on whether or not to hire people and whether to promote them are covered only if the promotion would create a new contractual relationship between employer and employee. For example, a challenge to a refusal to elevate an associate to partner in a law firm or to promote an employee from hourly to the salaried ranks might qualify for §1981 coverage. Similarly, a challenge to a refusal to grant tenure would likely be actionable under §1981 since it is a challenge to the denial of a new type of contractual relationship. Even a single scheduled nonreappointment is likely to be covered since a new "contract" is made each year and a nonreappointment is a decision not to create a new contractual relationship. By contrast, firing an employee in the middle of a contract would probably not be actionable under §1981 since it involves simply a termination -- not a decision to deny an employee a new annual contract.

Two procedural decisions are worth noting from last term. In Martin v. Wilks, ___U.S.___, 57 U.S.L.W. 4616 (1989), the

Court allowed a group of white firefighters to challenge an earlier court-approved consent decree that contained affirmative action goals for the Birmingham Fire Department. Previously, if such programs had been approved by a court as reasonable settlements of suits brought by minorities or women, such programs were regarded as immune from subsequent attack by whites or men who had notice of, but had not intervened in, the original case. The Court ruled that a consent decree is binding only on the parties to the original lawsuit and the white firefighters were free to challenge the eight year old court-approved decree.

In Lorrance v. AT & T Technologies, 57 U.S.L.W. 4654 (1989), the Court blocked a challenge to a seniority system which was put in place several years earlier through contract negotiating. The plaintiffs in the case were female hourly workers who were first employed in traditionally female jobs. After women began moving into traditionally male jobs, the union proposed a different seniority system based on time in particular jobs rather than overall time employed. In a 1982 layoff, the plaintiffs were demoted to lower paying jobs even though they had greater plant seniority than males who were retained.

The Court, however, held that the 300-day time period for filing a Title VII charge runs only from the date of the adoption of the seniority system even if the system's discriminatory effects are not felt until later. The Court said that if discrimination took place, it took place when the seniority rules were changed, not when they were applied and, accordingly, they should have been challenged at that time.

In Public Employee Retirement System of Ohio v. Betts, 57 U.S.L.W. 4931 (1989), the Court decided a major issue arising under the Age Discrimination in Employment Act. This case effectively eliminated much of the concern about age-based distinctions in employee benefit plans, at least at the federal level, and made it much easier for employers to defend such distinctions in the future. In Betts, the Court was reviewing a retirement plan which provided certain retirement benefits for state and local government employees. Benefits were payable based on age and service, or for persons under age 60 at retirement, on disability. In 1976, the plan had been amended to provide that disability payments could not constitute less than 30 percent of the retiree's final average salary. No corresponding floor applied to the age and service payments.

The plaintiff in the case, a county employee, retired at age 61 because of her health. Despite her medical condition, she was ineligible for the higher disability retirement benefits because of her age, i.e., because she was over 60. If she had been so eligible, she would have received nearly double the retirement benefits. The plaintiff argued that the cutting off of higher disability benefits at age 60 discriminated against her because of her age. The State of Ohio argued that the plan was protected by §4(f) (2) of the ADEA which provides, in relevant part:

> It shall not be unlawful for an employer...to observe the terms of...any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of the Act...

The Equal Employment Opportunity Commission filed as an amicus for the plaintiff in this case. It argued to the Court that §4(f) (2) protects age-based distinctions in employee benefit plans only when they are justified by the increased cost of benefits for the older worker. The EEOC pointed to regulations of the Department of Labor, the agency initially charged with enforcement of the ADEA, which stated that a plan would not be a "subterfuge" as long as "the lower level of benefits is justified by age-related cost considerations".

The Court did not feel bound by such regulations, however, observing that this mathematical approach to the definition of subterfuge "cannot be squared with the plain language of the statute" because the term subterfuge must include "a subjective element that the regulation's objective cost-justification requirement fails to acknowledge." The Court concluded that benefit plans protected under §4(f) (2) cannot reasonably be limited to plans in which all age-based reductions in benefits are justified by age-related cost considerations. Instead, the Court interpreted the statute as not being concerned with benefit plans at all. The Court believed, in reviewing the legislative history of the ADEA, that Congress fully intended to exempt all benefit plans from the coverage of the Act except in those limited cases where such plans are being used as a subterfuge for age discrimination in other aspects of the employment relation.

> Thus, when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relationship.

Finally, the Court rejected the view of many circuit courts and found that §4(f) (2) is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context. As a result, the burden of proof remains on the plaintiff to prove subterfuge.

While Betts stands as a stunning setback for plaintiffs, it must also be emphasized that Betts dealt with the federal age statute only and does not have any binding effect on the state courts in interpreting their own state age discrimination statutes. So, employers still need to be cautious about age-based distinctions in their employee benefit plan since these can still be challenged under many state laws.

II. PART-TIME FACULTY

In May of 1989, the Vermont Supreme Court handed down its decision in Vermont State Colleges Faculty Federation v.

Vermont State Colleges, Vt. (No. 87-224; May 12, 1989) in which it overturned a Vermont Labor Relations Board decision that had added certain adjunct faculty members employed by the Vermont State Colleges to an existing bargaining unit of full-time faculty. The VSC Faculty Federation, AFT Local 3180, had represented the full-time faculty at VSC since 1973. In 1987, it filed a Petition for Election with the VLRB seeking an election to decide whether the part-time adjuncts employed throughout the system desired to join the full-time unit.

The Colleges opposed the Petition on two grounds. First, the Colleges argued that all adjuncts were temporary employees and thus, ineligible for collective bargaining under the State Employee Labor Relations Act (3 V.S.A., §901 et seq). Adjuncts were hired on an as-needed semester-by-semester basis with no expectation of continued employment. The Colleges also argued that even if they were eligible to unionize, the adjuncts shared an insufficient community of interest to be included in a unit with full-time faculty. Unlike full-time faculty, adjuncts were not eligible for tenure or promotion; had no other responsibilities except teaching a specific course; received no fringe benefits; were compensated on a per course flat amount rather than as a percentage of a full-time faculty; and had either very little or no involvement in the governance of their institutions.

Nevertheless, the VLRB had determined that they qualified as state employees and that they shared a sufficient community of interest with full-time faculty to be included in the same unit. After an election in which the adjuncts voted to be added to the full-time unit,[1] the Colleges refused to bargain and appealed directly to the Vermont Supreme Court.[2]

The Court first found that the VLRB was correct in finding adjuncts to be eligible for bargaining. The VLRB had declared that only those adjuncts who had been employed for at least three semesters or were in their third semester, and who taught at least six credit hours a year, were eligible to vote. The Court found that the Board's finding that such adjuncts had a reasonable expectation of continued employment was reasonable and should not be disturbed. The Court refused to apply the New Hampshire Supreme Court's rationale in Keene State College Education Association NHER/NEA v. New Hampshire, 119 NH 1, 396 A.2d 1099 (1979) in which that Court found adjuncts at Keene State College to be "temporary" and not entitled to bargaining rights.

However, the Court reversed the VLRB's finding that adjuncts should be added to the full-time unit. Pointing out the numerous distinctions in conditions of employment between the two:

> These differences demonstrate the lack of community of interest shared by both groups and comprise a clear and convincing showing sufficient to overcome the presumption of validity afforded the Board's unit determination. To combine two groups with such divergent interests in the same unit would impede effective collective bargaining. New York University, 205 NLRB 4, 7-8 (1973); see also

> University of Vermont, 223 NLRB 423, 425 (1976); University of San Francisco, 207 NLRB 12, 13 (1974). It is not difficult to imagine, for instance, how issues of reimbursement and other job benefits for two distinct groups such as full-time faculty andadjuncts, when considered together, could lead toa confusion of the different employee groups' requests as well as unduly protracted bargaining. It was error for the Board to approve the inclusion of full-time faculty and adjuncts in the same collective bargaining unit. (Slip. Op. p. 10).

Since the original Petition, and subsequent election, only sought the addition of adjuncts to the full-time unit, rather than separate unit status, the Court's decision had the effect of invalidating the election altogether. Since then, the adjuncts have not petitioned for separate unit status.

III. NLRB DEFERRAL TO ARBITRATION

In January of 1990, the U.S. Court of Appeals for the District of Columbia rejected the National Labor Relations Board's policy of deferring unfair labor practice charges to arbitration whenever they may give rise to a grievance under a collective bargaining agreement. The Court held that the NLRB should not have deferred an individual employee's unfair labor practice charge because an interpretation of the contract would not have been required to decide the statutory issue. Hammontree v. NLRB, (No. 89-1137. D.C. Circuit, 1/23/90).

The grievant was a trucker who claimed that his employer retaliated against him because of his successful prosecution of a prior grievance. The Court rejected the argument that the existence of a non-discrimination clause in the collective bargaining agreement required the NLRB to defer the case to arbitration.

The Board's deferral policy, developed over the years as a means of having contractual claims heard by an arbitrator rather than the Board, has generally been applied in cases where the underlying complaint can be handled under the grievance and arbitration procedures of the collective bargaining agreement. The Court stated that its ruling would not result in a flood of grievances disguised as unfair labor practice charges being brought to the NLRB. The Court noted that "because we only require that individuals whose unfair labor practice claims do not require contractual interpretation be given an opportunity to present such claims to the Board, unions will not be able to circumvent their obligation to arbitrate disputes arising under collective bargaining agreements."

It is clear, though, that any retrenchment from the Board's deferral policy will heighten the likelihood of many more charges being filed. Unlike arbitration, the Board's investigation and prosecution of an unfair labor practice charge is virtually cost-free for a union.

IV. NLRB JURISDICTION

On November 21, 1989, the NLRB issued an Advisory Opinion involving its jurisdiction over the University of Vermont. In University of Vermont and Vermont-NEA and Vermont Labor Relations Board and State of Vermont, 297 NLRB No. 42, the NLRB ruled that it would decline to assert jurisdiction over UVM because the institution was not an employer within the jurisdiction of the National Labor Relations Act. While this may appear to be an obvious result for those who view UVM as a typical state university, not normally subject to the private sector jurisdiction of the NLRA, the Opinon was actually quite controversial and effectively ended what had been 13 years of Board jurisdiction over UVM.

In 1976, in University of Vermont, 223 NLRB 423, the NLRB had agreed with both the University and the petitioning American Federation of Teachers that it would take jurisdiction because the University was sufficiently private in nature and was not a "political subdivision" of the state of Vermont, which would have precluded NLRB jurisdiction. While the AFT lost an election among UVM's full-time faculty that year, the Board processed several unfair labor practice charges involving UVM employees and even certified a unit of educational television employees employed by the University.

However, in January 1989, the Vermont General Assembly enacted a law which specifically included the University of Vermont within the coverage of the Vermont State Employees Labor Relations Act.[3]

In seeking the Advisory Opinion, the Vermont-NEA and State of Vermont argued to the NLRB that the University was a political subdivision of the state. They contended that the University is a creation of the Vermont Legislature and exists as an "instrumentality" of the state; that UVM's Board of Trustees is administered by a majority of individuals responsible to public officials of the state; and that as officers of the state, all members of the Board are subject to removal by the State of Vermont.

The University argued that UVM was not a political subdivision and that the Board was correct in its original determination to assert jurisdiction. In support of its position, the University argued that its private characteristics are: (1) it has no power of eminent domain; (2) it is not entirely exempt from state and municipal taxation; (3) trustees are not state officers or subject to removal by public officials; (4) the University does not recognize that its records are "public records" and open for inspection, and (5) the University has not been declared immune from suit under the 11th Amendment which prohibits actions by the state by non-residents.

The University also cited the institution's autonomy and independence from the State in terms of its independent control of personnel policy-making over its nonunion employees and also through its 10-year history of collective bargaining with the IBEW, the NLRB-certified union representing its educational TV workers.

The NLRB began its analysis with NLRB v. National Gas Utility District of Hawkins County, 402 U.S. 600 (1971), where the Supreme Court laid out the relevant factors to assess in determining political subdivision questions. Based on the Hawkins case, the Board found UVM to be a political subdivision.

> We base our conclusion on both prongs of the Hawkins test and find that the University of Vermont was created directly by the State, so as to constitute a department or administrative arm of the government, and that the University is administered by individuals who are responsible to public officials or to the general electionate. (Slip. Op. p. 12).

On this last point, the Board noted that 12 of the 21 UVM trustees are selected by the State, either by legislative election or by gubernatorial appointment. Other items noted by the Board:

1. The University's real and personal property used for education purposes is exempt from taxation.
2. UVM's finances are under the supervision of the State.
3. From 1959-1975, the Vermont legislature passed laws mandating tuition and domicile requirements for Vermont students.
4. Twenty-five percent of the University's operating budget comes from state appropriations.
5. The University is subject to the State's Open Meeting Law and Public Records Law.

Finally, the Board noted "while not controlling we also rely on the fact that the Vermont General Assembly recently enacted a bill that includes UVM's employees within the coverage of the Vermont State Employee Labor Relations Law." (Slip. Op. p. 14).

While the University is still pursuing a legal challenge to the State Board's jurisdiction, it is nonetheless participating in bargaining unit hearings before the VLRB. Those hearings, still in progress, are focusing on a variety of issues including a Yeshiva-type argument under the state act.

V. OTHER CASES

In Brown v. Trustees of Boston University, 51 FEP Cases, 815 (1st Cir. 12/1/89), the U.S. Court of Appeals for the First Circuit affirmed a lower court decision awarding tenure to Julia Brown after a finding that she was discriminated against on the basis of her sex.

Julia Brown was an assistant professor of English at B.U. who was reviewed for tenure during the 1979-80 academic year. Ms. Brown had excellent teaching and service credentials and, with regard to her scholarship, she had published one book dealing with the novels of Jane Austen, which was essentially a revision of her doctoral dissertation. Ms. Brown was unanimously recommended for tenure by the English Department committee and by the Appointment, Promotion and Tenure Committee of the College of Liberal Arts. The Dean also recommended tenure, albeit with some reservations about her "historical scholarship". The University APT Committee recommended tenure by a 9-2 vote; however, the Provost, underlining what he considered limited scholarly output, recommended a three-year extension for tenure review. Since this created a split of opinion, Brown's case was sent to a special ad hoc committee "composed of three impartial scholars from outside the B.U. community". The committee voted 2-1 in favor of her tenure.

However, upon review of the committee's report, President John Silber refused to recommend Ms. Brown for tenure, claiming that the ad hoc committee did not give a strong, unqualified endorsement of the candidate's work. Brown then brought suit in Massachusetts Superior Court alleging that B.U. had violated its collective bargaining agreement with the B.U. faculty union by discriminating against her on the basis of her sex. The University removed the case to federal court, and Ms. Brown added additional claims of violations of Title VII and the Massachusetts Fair Employment Practices Act.

Prior to the trial, one issue arose as to whether or not the case would be heard by a jury. While Brown had no right to a jury trial under either Title VII or the Massachusetts Fair Employment Practices Act, she was found to have a right to a jury trial on her contract claim and that this extended to all issues common to the three separate claims. The most important factual issue common to the three claims was whether Boston University had denied tenure because of her sex.

The University's main contention was that the denial of tenure to Ms. Brown was based on a lack of scholarship, not sex discrimination. To counter this argument, Ms. Brown was able to prove that in the six years prior to her review, no single candidate in the English Department had a second published book and that all the books published by tenure candidates in her department were, like hers, based on the candidate's dissertations. One successful male candidate had not published a book at all.

Additionally, the plaintiff showed that her high support from the various committees either equalled or exceeded that of other successful tenure candidates. The jury ruled in her favor and awarded her $214,000 plus attorney's fees and she was reinstated with tenure.

On appeal, the University raised numerous issues, some of them evidentiary in nature, i.e., claims that the lower court improperly received or rejected certain evidence during the trial. While the University was upheld on a number of these points, the Court did not find the errors sufficient to have prejudiced the outcome of the trial.

One of the key arguments on appeal was that the lower court should not have awarded Ms. Brown tenure.

> The University argues that tenure is a significantly more intrusive remedy than remedies ordinarily awarded in Title VII cases, such as reinstatement or seniority, because a judicial tenure award mandates a lifetime relationship between the University and the professor. The University further contends that due to the intrusiveness of tenure awards and the First Amendment interest in academic freedom, a court should not award tenure unless there is no dispute as to a professor's qualifications. Thus, the University concludes, the district court should not have awarded tenure to Brown, because there existed a dispute as to her qualifications. 51 FEP at 836.

The Court rejected this argument. While recognizing that courts must be "extremely wary of intruding into the world of university tenure decisions," the Court said that "once a university has been found to have impermssibly discriminated in making a tenure decision, as here, the University's prerogative to make tenure decisions must be subordinated to the goals embodied in Title VII." 51 FEP at 836.

On the question of causation, the Court found that the jury was instructed properly on the burden of proof issues. They were properly instructed that the plaintiff must show that but for the impermissible motive, the University would have granted tenure. Thus, the jury's verdict, including the award of tenure was upheld.

It is unusual to have a sex discrimination case tried by a jury. While jury trials are provided for in age discrimination cases, courts have long held that Title VII claims such as sex discrimination, are to be tried before the court not the jury. However, by citing the nondiscrimination clause of the collective bargaining agreement, the plaintiff was able to get a jury trial by simply arguing breach of contract. While claims under collective bargaining agreements normally go to arbitration, the B.U. contract did not allow for the arbitrability of denial of tenure cases. Thus, Ms. Brown was able to go directly to court on a breach of contract theory.

Other cases of note include Lamphere v. Brown University, 49 FEP 1465 (1st Cir. 1989), where the plaintiff was third choice on the hiring committee's list for a special tenured professorship. When the first two choices, both men, turned down the offer, Brown reopened the search rather than give the job to the plaintiff. The plaintiff claimed sex discrimination in the University's refusal to hire her.

The Court noted first that the decision to reopen the search did not necessarily prove sex discrimination despite the search committee members' changing reasons, failure to articulate reasons contemporaneously and conflicts among individual's reasons. The Court said such conflict and confusion might simply reflect the group decision-making process at work in the highly subjective area of faculty hiring.

On the merits of the decision, the Court found that the refusal to grant plaintiff the job was not motivated by sex discrimination because (1) many faculty members who attended the meeting at which it was decided to reopen the search had not been present at the first meeting at which plaintiff was placed third on the list; (2) the department evaluated her credentials as well below that of the two men and ultimately, not meeting the requirements of the position.

In Wilkins v. University of Houston, 51 FEP Cases 516 (S.D. N.Y. 1989), the U.S. District Court for the Southern District of Texas found that the University had discriminated against female salaried professional and administrative employees by implementing a pay plan presenting lowest and highest salaries that should be paid for each job. The evidence revealed that three men and 17 women were being paid below first quartile for their job levels although the plan covered 34 men and 35 women.

ENDNOTES

1. Full-time faculty also separately voted their approval of the addition of the adjuncts to their unit.

2. In a separate procedural battle, the Colleges filed a Motion to Suspend Bargaining Order with the VLRB and with the Court. Both denied the Motion and ordered the Colleges to bargain with the adjuncts even though it was challenging the unit on appeal. However, since the AFT was, by that time, deeply immersed in trying to settle its contract for full-time faculty, it chose not to immediately pursue bargaining for the adjuncts. The Court's decision invalidating the election was issued prior to any bargaining taking place.

3. The faculty and nonprofessional staff of the Vermont State Colleges -- an independent entity from UVM -- have been unionized for years under that statute.

IV. POLITICAL ISSUES OF THE 90's

A. Union's Role in Politics in the 1990's: Lobbying and Coalition Building

B. Political Action and Public Sector Higher Education Unions: California and Hawaii – Two Success Stories

POLITICAL ISSUES OF THE 90's

A. UNION'S ROLE IN POLITICS IN THE 1990's: LOBBYING AND COALITION BUILDING

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It is only fitting in the city of Tammany Hall (New York) that we spend a few minutes reflecting about the practical side of politics and the legislative programs of unions and universities. There is a little book that I often use in my politics course called Plunkett of Tammany Hall. George Washington Plunkett was a district leader in the Tammany Hall political operation throughout a good portion of the late nineteenth century, and before retiring he dictated to a journalist some thoughts (A Series of Very, Very Plain Talks About Very Practical Politics) about his years as a political boss in New York City. So, in one way it is somewhat fitting that in the city of Boss Tweed and George Washington Plunkett we shift the focus from the law and from the more formal aspects of collective bargaining to more mundane and more practical matters. Or, to put it another way, to the nexus between the academic world and the political world. This holds true not only for public institutions, but for private ones as well.

Many will recall the great organizing drives of the major national unions in the 1970s to represent faculties throughout the United States which ended in a practical sense after the Yeshiva decisions. These national campaigns often had as a principal focus the power and clout of the respective unions in state capitals around the nation. How faculty members responded to that issue was a major determinative in the election of bargaining agents. Interrelated was the traditional reluctance of professors to accept politics as a way of doing business. The accepted academic view held that politics is a kind of grimy, dirty, grubby business somebody else has to do, but that it should remain out of the academic world. Academics spend much of their work life in splendid isolation. Academic research is largely oriented in that way. Forming coalitions and working with others is not something that professors and folks in the university community do very easily. One of the significant advantages of higher education unions is that they help break down those barriers and heighten and increase the discourse that takes place across a variety of arenas -- one of which is an educational legislative agenda.

No account of lobbying in the legislative process would be complete without an understanding of the enormous changes that have taken place in the governships and the state legislatures in the past few decades. Two excellent books -- Goodbye to Good-Time Charlie by Larry Sabato and Legislative Life: People, Process and Performance in the States by Allen Rosenthal -- should be required reading for anyone engaged in the legislative process. These works are essential for an understanding of the evolution in the executive and legislative branches since the end of World War II; they detail the modernization of governships and legislatures. The thesis of both can be summarized briefly:

(1) Gone are the old state politicians and the courthouse gangs that dominated state governments for most of the 19th and 20th centuries.

(2) The good-time Charlies are virtually extinct in the governor's office and part-time do-little legislators are almost as extinct.

(3) Governor's offices and legislatures have transformed themselves enormously, partly as a response to the dramatic shift of responsibility and funding from the federal to state government.

Certainly, not all state legislatures have been revitalized; that trend is more uneven among the states. But, many have and the reforms which have taken place have changed the environment in which lobbyists function. No legislative program can be successful without a healthy awareness of the new environment in the state capitals. In the last 30 years, there has been more change in the state capitals and in the legislative process than in the preceding 130, and those changes have been of paramount importance. In effect, state governments have become much stronger. They have developed a far better capacity to govern than ever before, and the executive and legislative branches have transformed themselves in response to the enormous challenges that confront their states.

Not every state legislature has gone through some magnificent transmogrification into a modern, smoothly running efficient system. No one who lobbies for a moment would make that argument, but there are enormous changes that have taken place that no one who lobbies can fail to understand and still be successful. An understanding of these trends is vital if one is to have a successful legislative program. There are:

(1) **POWER DIFFUSION:** American legislative power is not centered for very long, if ever, in a particular quarter of any state legislature. Obviously, a measurable amount of power is centered within the legislature's integral parts: committees, committee chairs, legislative

leaders, senior members, and level of partisan control. Efforts to successfully influence legislation requires an intimate knowledge of a legislature's principal actors. In Pennsylvania, the locus of power resides in the leaders of the four legislative caucuses who set the legislature's time schedule and who are the principal brokers of substantive decisions. Very few important pieces of legislation successfully find approval without the support or, at least acquiescence, of legislative leaders. Any organization with a significant legislative agenda must be on intimate terms with the legislative leadership and their top staffs. This requires an understanding of the leadership's views on major state issues as well as one's own specific needs.

(2) **PROCESS CHANGES**: Every state legislature has its own particular way of processing important pieces of information. Here, I am not just referring to the guides that explain "how a bill becomes a law" but, more importantly, a knowledge of at what point in the legislative process most critical decisions are made regarding the passage of a pending piece of legislation. In Pennsylvania, for example, the conference committee has emerged, not merely to handle different versions of a bill but as a place where controversial decisions are very often resolved. Since 1982, the Pennsylvania Legislature has been divided -- the Democrats controlling the House, the Republicans dominating the Senate -- legislative leaders iron out differences in the privacy of a conference committee without other members of the legislature, the press, and special interest groups influencing the process nearly as much as when bills are considered on the floor of either chamber. Most importantly, bills voted out of conference committee move to each chamber for a floor vote which takes place without an opportunity for amendment, thus ensuring passage in the form most desired by the legislative leadership. In recent years, the Pennsylvania Legislature has used the conference committee as a device to secure the passage of an annual Pennsylvania budget, since the process enables legislative leaders to enact a budget without pork barrel amendments.

(3) **INCREASE OF PROFESSIONAL STAFF**: The professionalization of legislative staffs began during the 1960s and has increased with rapidity ever since. Most state legislatures employ hundreds of professional aides. New York and California employ over 1000. Pennsylvania currently has about 600 paid professional staff. In most states, the legislative staff has emerged as a leading policy-making entity in its own right, and, depending on the circumstances, are often able to get their own ideas written into law with some frequency. Obviously, the effectiveness and power of these staffs vary enormously from legislature to legislature and from situation to situation.

There was a time when organizations would largely conduct their business, whether they be unions or the business community, largely in isolation of other groups. No state's lobbying activities were conducted more along labor-management lines than Pennsylvania. Unionism was a part of family life for countless millions of Pennsylvanians. It was not easy for labor unions, whether the United Mine Workers or the Steel Workers -- whose principal base of operations for decades was in Pennsylvania, to begin to change the way in which they did business. But, they formed coalitions with the Pennsylvania Chamber of Commerce or the Pennsylvania Manufacturing Association; counterparts on the other side of many issues. In the last decade or so, much has changed. The Pennsylvania AFL-CIO and the Pennsylvania Chamber will together support public bond issues for clean air and clean water and support legislation that will provide additional monies to improve the infrastructure of the state. In the last decade, there have been at least 15 or 20 major coalitions of traditional business and labor groups which have worked together to improve the economic climate of the state. Perhaps, the recession of 1982-83 forced labor and the business community to work together.

There are, at least, four or five practical coalitions that operate at varous times, and higher education has been a factor in them. One such coalition is an issue-based coalition. This coalition, mainly involving people from different organizations, supports a particular agenda primarily because the components of the coalitions have one issue in common, whatever that issue might be. It might be an environmental issue such as pure water or clean air; as a result, environmental and labor groups and even business organizations will join and work together for the passage of a particular set of legislative initiatives. A coalition that is issue-based might last two, three or four weeks or one legislative session, and then wilt away. Issue-based coalitions can be very important when the political process requires a public referendum on an important public matter because they help engender public support for the proposal.

A second kind of coalition might be called a value-based coalition. Value-based coalitions are on the rise. The Webster decision, handed down by the Supreme Court in the summer of 1989, helped generate the creation of many value-based coalitions. People with similar views on the abortion question coalesced with one another to oppose or support abortion restrictions in the various states. Many of these individuals and groups had been virtually nonexistent in the legislative process before Webster.

The third kind of coalition is more familiar: interest-based coalition. These coalitions are very often formed along economic or occupational lines. The education sector has historically operated in such a coalitional basis. These coalitions tend to be of longer duration because the agenda of the various groups remains more constant. There might be dues that go into a common coffer for support of the activities. There would be the use and implementation of a joint agenda on a regular basis.

The last kind of coalition that has been identified has been called an employee-based coalition. This coalition usually consists of the representatives of groups of employees who have the same employer or the same source of funding. Sometimes they are unionized, sometimes not. An employee-based coalition more often has a longer life and has a more pervasive influence on the legislative environment. Political action committees, high profile lobbying, and the use of technical experts also accompany employee-based lobbying.

POLITICAL ISSUES OF THE 90's

B. POLITICAL ACTION AND PUBLIC SECTOR HIGHER EDUCATION UNIONS: CALIFORNIA AND HAWAII – TWO SUCCESS STORIES

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INTRODUCTION

Higher education labor unions are coming to recognize the importance of bringing external forces to bear on the bargaining process, particularly state legislatures which often maintain final or fiscal authority over public university contracts. While the focus in this paper is on public universities, there is good reason why private sector university unions should consider developing political action programs as well. California, for example, just went through a three year period revising the California State Master Plan for Higher Education; one of the four higher education segments which was tremendously involved was the independent universities and colleges. The independents were regularly represented by their administrations, but the faculty and their concerns were not equally represented. Private sector university unions must begin to become more politically active if they wish to have any part in the external decision making bodies which do impact the campuses.

Historically, not only faculty but administrators and governing boards have been reluctant to become involved in political activity. They claim that universities are different or "unique". This was noted with concern by Senator Clayborn Pell, Chairman of the Senate Labor and Human Resources Education Subcommittee, in the April 1989 Congressional Quarterly. While talking to a number of Washington-based higher education administrative groups, he is reported to have stated that, in an era when university budgets and funding at the federal level had been so tremendously threatened, he would have expected to see "a proliferation of political action committees." He went on to observe not only had such not occurred but that "the cost of such inactivity can be enormous."

Most likely, the greater fear that both faculty and administrators have is the fear that involvement in political and legislative activity, particularly within state legislatures, might cause legislators to decide that they should intrude even more into university affairs, including curricular areas. The ironly is that legislatures have already become heavily involved in dictating the curriculum for teacher education, and faculty and administrators have done little, if anything, to resist. Had that happened to the rest of the university over the years both administrators and faculty would probably be far more politically active.

Most governing boards have also been reluctant to move into politics at the state level, at least on issues of primary concern to the university they represent. They are often appointed by governors and normally are not educators. While they may be very active politicians themselves, it is in a different arena. As allies of the governor, they often become agents for the status quo rather than advocates for the needs of the institutions on whose boards they sit.

This perhaps fits the pattern of why collective bargaining for faculty even exists since many accept the theory that unions moved into the void created by the failure of collegiality. Even today, with all our contracts and protections, university budgets appropriated for specific purposes by the state legislature are often freely shifted at the campus level to other purposes. The very nature of bargaining in the public sector has forced faculty unions to become politically active. What is bargained is often approved, at least for fiscal control purposes, by legislatures or is controlled behind the scenes by deals cut by administrators or governing board members and the state's fiscal bodies. It is a reality: politics in the state legislatures are an integral part of public sector bargaining whether faculty, staff and administrators like it or not.

Very briefly, this presentation will look at two different cases and contrast two very different, both successful, political action efforts by higher education unions. In one case, California, thre has been a long history of political action by the union prior to certification which did not occur until 1983. In Hawaii, the union has been the bargaining agent for sixteen years but significant political action efforts are less than a year and a half old. In California, membership is spread across the state while in Hawaii, it is heavily concentrated on one island where the legislative center exists. In both cases, the political action programs described in this paper have proven critical to the unions' bargaining environments.

THE CALIFORNIA FACULTY ASSOCIATION

The California Faculty Association (CFA) represents 20,000 full- and part-time faculty in the California State University (CSU) system, which is spread across 20 different campuses. The union was certified in 1983 but political efforts and action on part of the faculty predated bargaining by more than a decade. From the early seventies, all of the groups seeking the passage of collective bargaining legislation and the right to represent the faculty were active in the state legislature on issues of concern to the faculty. This activity was viewed as the only alternative to what the faculty considered a terribly unresponsive management in the CSU. At that time, there were no formal political action committees or funds. Political action was primarily accomplished through lobbying by the leaders and presidents of these organizations. And legislators were often both sympathetic and responsive to issues that had no cost.

The year of 1976 serves as an outstanding example. First, the legislature approved a grievance procedure for the California State University which included binding arbitration paid for by management on a wide range of issues including personnel decisions relating to tenure and promotion. The procedure that existed in law in California prior to bargaining was better than procedures which exist in many contracts in effect today. Second, another bill was approved requiring open files which meant that all faculty had the right to see their personnel files and to rebut what was in the file. Finally, a bill was approved for one group of employees that later became part of the faculty bargaining unit, the librarians, to set up an alternative work program which provided partial equivalency to the academic year while protecting the full year funding for the campus libraries.

In 1978, legislation providing for collective bargaining in California's four-year colleges and universities was passed. Unit hearings and certification elections took another five years. In 1982, the California Faculty Association, prior to its certification as bargaining agent in 1983, decided to expand its collective bargaining and political action efforts of the previous decade by setting up a voluntary political action contribution fund. The initial contributions and pledges were minimal. In 1985, CFA's Assembly voted to establish a formal political action fund which provided for contributions through negative dues checkoff whereby every member is notified and given the option not to participate. CFA ended up with 97% participation by its members. Contributions were based on income: for those members of the unit making $1800 a month or less, it was $1.00 per month while for those making over $1800, it was $2.00 per month.

The CFA also decided it was essential to move beyond just being the faculty representative to begin building coalitions to establish greater status in the state legislature as a political player in the state's higher education program. As part of this effort, it was determined in a coalition of public employee unions to run the immediate past president of the CFA for the California Public Employee Retirement System Board, the largest public retirement system (including all CSU employees) in the country with a $57 billion dollar trust fund. This faculty member, Dr. William D. Crist, is now on that board and chairs the Benefits Committee.

The union has a complex system of guidelines, rules and regulations governing its political action programs and funds. There are detailed procedures for both candidates and issue endorsements that involve participation by the local chapters, the statewide Political Action/Legislative Committee, and the state Board of Directors. The CFA has built an incredibly strong member-based program which involves training at the local level, bringing legislators regularly on campus to meet with faculty, lobbying in local offices, local endorsement recommendations, precinct walking, and statewide telephone trees.

The CFA currently collects a total political action fund of about $170,000 per year. In 1989, the California Faculty Association contributed $154,000 to candidates, placing it 30th on the list of state political action committees and corporations like Shell, Chevron, and Philip Morris. Two of those at the top of the list are the California Teachers Association, CFA's largest state affiliate, which contributed $359,323 to candidates and the California Medical Association PAC which contributed $914,737 to various candidates. These last two figures are to give some understanding of the size of what political action and activity in a state like California takes. Because of recent reform measures, broad-based PACs are now limited to contributing no more than $5,000 annually to any candidate. As a result, the union has found that it has to govern carefully what happens in the local chapters. After encouraging chapters to become active in working for legislators in their districts by sponsoring functions on campus and in the community, the CFA must be sure to record and report all expenditures toward the total allowable. A mere expenditure on a candidate of $100 on a campus could jeopardize the entire statewide program of the union.

California is also a state with many ballot initiatives which means that the union must be prepared to respond to, or work for, initiatives. The CSU's funding was hurt by a initiative that passed in 1988 because a second initiative to increase the state's limit on funds available for the state budget failed. The CFA invested $50,000 in that original effort. This year, 1990, $25,000 has been allocated for a similar initiative while another $38,000 has gone into fighting two reapportionment initiatives. In such a political context, coalitions become a political necessity and unions must learn to work with groups like the California Tax Reform Association and the Public Affairs Network. These are coalitions that are separate from the normal coalitions that the union has with affiliates such as the California Labor Federation, the California Teachers Association, the SEIU and other pro-education groups.

Fortunately, while the laws are beginning to move towards political campaign controls, they are emphasizing grassroots activity. The CFA's operation has expanded to include two full-time professional staff members, released time for an elected Political Action/Legislative Committee Chair, and an organizational involvement in more state level activities such as Board of Trustee confirmation hearings, California Post-Secondary Education Commission appointments, and even State Board of Education appointments.

In concentrating on issues related to bargaining, the CFA has been very careful since 1983 not to take bargaining issues related to contract specifics to the legislature, but to focus efforts on broad issues such as affirmative action and the system's budget practices to bring pressure on the CSU Board of Trustees and the administration, in general. Obviously, the major legislative arena is the system's budget. The California State University budget is controlled by the legislature and an effort by the Trustees to obtain independent jurisdiction a few years ago was, in fact, defeated because the CFA opposed it.

In closing this case, two brief but current examples demonstrate how in a decade and a half a faculty union can achieve a real position of power in a state like California. At the CFA Assembly luncheon in April 1990 in Los Angeles, U.S. Senator Pete Wilson, Republican candidate for governor, was the keynote speaker. Sitting with him at the head table were CFA officers; Ed Foglia, President of the California Teachers Association representing over 200,000 members and a known power in the state legislature; CSU Chancellor Ann Reynolds who had come early that morning to meet with the CFA Council of Lecturers, as well as the CFA Council of Presidents; and, the chair of the Public Employees Retirement System Baord of Administration Benefits Committee. Leadership of the California Legislature routinely calls upon the union's Political Action/Legislative Committee to find out where the union is on various issues. These are positive examples of what a large or statewide faculty union can achieve through a concentrated political action program.

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY

The University of Hawaii Professional Assembly (UHPA), in contrast to the CFA, has been the bargaining agent for the faculty at the University of Hawaii since 1974. They were the last group of public sector employees in Hawaii to organize for bargaining and they represent faculty of all levels of post-secondary education in Hawaii: community colleges, four-year colleges, and research faculty including faculty in the schools of law and medicine. Between 1970 when their bargaining law was passed and March 1975 when their first contract was signed, the faculty received no salary adjustment despite the fact that the state had taken the position that all employees of the state were to be treated exactly the same with exactly the same percentage salary increase given across-the-board. Between 1975 and 1988, that same across-the-board percentage approach held and the previous losses were not restored. Faced with this history, the UHPA recognized that, for the first time, they might have to break with the other state employee unions in the 1988 negotiations in order to reach an appropriate salary settlement.

Bargaining in Hawaii is controlled by the governor. The "employer" consists of a group of two Regents, the State Director of Budget and Finance, the State Director of Personnel, and the State Chief Negotiator. The spokesperson for management's bargaining team is selected by the university administration, but reports to the official state "employer". There has been a long history that the state would not discuss economic matters until non-economic matters had been settled using the leverage of the closing of the legislature in April to force settlement since once the legislature had adjourned ratification of any tentative agreement had to wait for the next session of the legislature. As a result, the unions have a history of settling at this last moment. In the case of 1988/89, the other unions did settle for a 5.25% salary increase for each year of a four-year contract.

In 1988, the UHPA determined they could no longer effectively represent their faculty through the traditional bargaining approach and they could not depend on the other unions to hang tough in fighting for the faculty's salary demands. With this decision came the recognition that UHPA must become a player in the political arena in Honolulu. In order to impact effectively on the legislature, it was essential to gain the community's support and have the community communicate this to their legislators.

Since the late 1970's, the UHPA had had a voluntary political action fund of $12 per year but only 200 members out of the unit of 3,000 participated. Recognizing that this would not be sufficient to influence legislators in any significant way, UHPA's Assembly voted to establish a political action fund that was part of a dues increase and thus no longer voluntary. Each faculty member now pays $5.00 a month into this fund. Since February 1989, they moved from being a minor contributor in the state of Hawaii to being the largest PAC in the entire state.

In addition to the public knowledge of the creation of this political action fund, the UHPA decided to develop a massive newspaper and radio campaign directed at the legislature and the governor to gain support for UHPA's positions with respect to faculty salary needs. Such a campaign was geared to communicate to legislators that their actions would have direct consequences in the future. Stressing the issue of faculty salaries in Hawaii as compared to the mainland, the UHPA focused on the inability of the university to successfully recruit new faculty, the resulting potential decline in quality education, and the ultimate risk to future educational opportunities for Hawaii's children. For example, one radio spot featured a local Honolulu small business personality (known throughout the islands) who talked about why the people and the legislature had to start supporting the university and the damage that was being done as a result of inadequate funding, with the moderator pointing out that the spot had been paid for by the UHPA. At the same time, the UHPA began to build alliances with student groups on the campuses and to take more direct political action with local legislators.

The campaign worked and the UHPA got a settlement of between 35%-36% salary increases for most of the faculty over four years with one year retroactive and up to 60% increases for some of the senior faculty. In addition, they achieved a number of their non-economic goals. Looking toward the future, the UHPA plans to continue their public relations and media activities on behalf of funding for the university and the faculty.

Entering 1990, the UHPA has an annual political action fund of $190,000 that will be spent entirely on state Senate and House races. For example, they have already made a $1,000 contribution to each of the 27 elected officials that they had endorsed in the year prior to their actually establishing the new political action fund. They are taking a census of their faculty members to learn which incumbent legislators are supported and which ones are not supported, and why. They are conducting a public statewide survey of attitudes and opinions in looking toward the 1990 elections. The political action program and the media program is being more closely integrated. For example, media education activities are continuing with a Congressional debate being sponsored by the UHPA-PAC and KHET-TV. A series of radio and television spots for supportive candidates are being planned for the fall.

In one year, there has been major recognition of power possessed by the UHPA. The University of Hawaii Regents have yet to recognize fully this shift and the UHPA seems to think that such recognition will not occur until a number of new Regents have been appointed. The union is politically active in the process of new appointments. Meanwhile, the university's president has recognized that he can achieve more through a coalition with the union than he can by depending on his own subordinates to lobby in the legislature. Furthermore, the very independence of the union has enabled him, through working in coalition, to impact issues which the president would otherwise be proscribed from becoming involved in. The UHPA is now recognized as a group that must be viewed seriously and worked with as allies.

SUMMARY

Both unions provide examples of the importance of politics to public sector negotiations. This has been recognized, in part, by judicial reviews for fair share fees where the courts allow some fair share fees to be used for lobbying on issues related to representation and working conditions. Such decisions legitimate and reinforce the overlap between lobbying and legislative efforts and the union's role in bargaining and representing the entire bargaining unit. Faculty and administrators must assume that the price of political involvement will not be greater than the gains, and unions and universities must learn that they will never be viewed as credible unless they enter the political arena. As unions become more politically active, management and governing boards must realistically consider cooperating with faculty unions in the political arena. Massachusetts and New York provide examples of places where institutional health and survival may be at stake. It is more apparent that administrations and governing boards cannot protect their budgets alone, especially in states facing major fiscal crises. They need the faculty and other campus unions working with them to lobby legislators and develop a common agenda to support the university and its programs. They need to learn that together they are much stronger in facing external threats than they will ever be apart. Hopefully, this will lead to both coalition building and strageqic planning for the future as well as the advancement of academic excellence and equity on all campuses, public and private.